87-459

No.

Supreme Court, U.S.
FILED
SEP 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL IRANIAN OIL COMPANY,
Petitioner,

v.

ASHLAND OIL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STEPHEN M. TRUITT
Counsel of Record
MARK SCHATTNER
SUSAN L. LAUNER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

ALEX A. ALSTON, JR.
CHARLES R. DAVIS
THOMAS, PRICE, ALSTON,
JONES & DAVIS
121 North State Street
Jackson, MS 39215-1532
(601) 948-6882

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

I.

Whether the United States Arbitration Act (Sections 3 and 4) is of no force and effect in an international business dispute involving a United States party solely because the agreement to arbitrate the dispute included a clause siting the arbitration in a country that has not signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and one party refuses to arbitrate in that country or anywhere else.

II.

Whether alleged acts of Iran may be imputed to the National Iranian Oil Company, a separate juridical entity, in the absence of any evidence that the Company may be equated with the government of Iran and held responsible for that government's actions.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTE AND TREATY INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
A. The Failure to Enforce the Arbitration Agreement Conflicts with this Court's Decisions Concerning International Arbitration and Threatens to Undermine Commercial Relations Between the United States and a Majority of its Trading Partners	6
B. The Decision Below is Irreconcilable with Decisions of this Court and the Purposes of the Foreign Sovereign Immunities Act, and Jeopardizes International Commerce Involving United States Corporations	12
C. The Denial of a Stay under Section 3 of the Arbitration Act is Contrary to Long-standing and Controlling Decisions of this Court and is a Serious Threat to the Federal Policy Favoring Arbitration	17
CONCLUSION	19
APPENDIX A	1a
APPENDIX B	4a
APPENDIX C	22a
APPENDIX D	27a
APPENDIX E	29a
APPENDIX F	46a

TABLE OF AUTHORITIES

CASES: Page

Continental Grain Co. v. Dant & Russell, Inc., 118 F.2d 967 (9th Cir. 1941) 11

Czarnikow Ltd. v. 'Rolimpex', (1979) A.C. 351 ... 15

E.C. Ernst, Inc. v. Potlatch Corp., 462 F. Supp. 694 (S.D.N.Y. 1978) 9

First National Citibank v. Banco Para El Comercio, 462 U.S. 611 (1983) 13,14,15,16

Hercaire International, Inc. v. Argentina, Nos. 86-5264; 86-5317 (11th Cir. July 14, 1987) 14,15

Letelier v. Republic of Chile, 748 F.2d 790 (2nd Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) 14

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 6,9,18

Patten Secs. Corp. v. Diamond Greyhound & Genetics, Inc., No. 86-5646 (3d Cir. May 21, 1987) 11

Practical Concepts, Inc. v. Republic of Bolivia, 613 F. Supp. 863 (D.D.C. 1985), *vacated*, 811 F.2d 1543 (D.C. Cir. 1987) 10

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1976) 6,9,10,18

Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935) 17

Snyder v. Smith, 736 F.2d 409 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984) 11

STATUTES AND REGULATIONS:

9 U.S.C. §§ 1, *et seq.* 2,4,10,11

9 U.S.C. § 2 2

9 U.S.C. § 3 5,17,18

9 U.S.C. § 4 5,7,8,9,17,18

9 U.S.C. § 5 2

9 U.S.C. §§ 201, *et seq.* 2,5,7,9,10,11

Table of Authorities Continued

	Page
9 U.S.C. § 206	8
15 U.S.C. § 714	15
28 U.S.C. §§ 1602, *et seq.*	12,13,14,15
31 C.F.R. Part 535	3
44 Fed. Reg. 65581, Nov. 14, 1979	3
MISCELLANEOUS:	
Comm. on Commerce, Trade and Commercial Law, *The United States Arbitration Act and its Application,* 11 A.B.A.J. 153 (1925)	8
Exec. Rep. No. 10, 90th Cong. 2d Sess. 5 (1970)	7
H.R. Rep. No. 1487, 94th Cong. 2d Sess. 29 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6628	14
United States Department of Commerce, Bureau of Census, "Highlights of U.S. Export and Import Trade," FT990, Tables 5 and 8 (December 1986)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. _____

NATIONAL IRANIAN OIL COMPANY,

Petitioner,

v.

ASHLAND OIL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. 4a-21a, *infra*) is not yet officially reported.[1] The opinion of the United States District Court for the Southern District of Mississippi (App. 22a-26a, *infra*) is reported at 641 F. Supp. 211 (1986).

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1987 (App. 4a, *infra*). The National Ira-

---

[1] The caption to this petition and the case below reflect all the parties to the proceeding.

nian Oil Company's ("NIOC") timely Petition for Rehearing and Suggestion for Rehearing En Banc were denied on June 22, 1987 (App. 27a-28a, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND TREATY INVOLVED

Sections 2, 3, 4, and 5 of the United States Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, reproduced in the Appendix at pages 1a-3a. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") appears at 9 U.S.C. §§ 201, *et seq.*

STATEMENT OF THE CASE

The underlying dispute concerns written agreements by which NIOC sold crude oil to Ashland Oil, Inc. through a wholly owned Bermuda subsidiary, Ashland Overseas Trading Ltd. (collectively referred to as "Ashland").[2] Ashland received, refined and resold the oil at issue. Ashland has refused to pay any portion of the more than $282 million it owes NIOC and has also declined to honor its agreement to arbitrate any dispute arising out of these transactions.

From 1974 to 1978, NIOC sold crude oil to Ashland. Oil production and sales were then interrupted by

---

[2] In the courts below, Ashland argued that it was not liable to NIOC because the agreements were between NIOC and Ashland Overseas Trading Ltd., not Ashland, and the court of appeals so recognized (App. 6a, *infra*). Subsequent to entry of the decision below, counsel for Ashland advised the Supreme Court of Bermuda that there was "privity of contract between NIOC and AOI [Ashland]" for purposes of that case and the proceedings in Mississippi (App. 61a, *infra*).

political turmoil in Iran. In early March, 1979, a delegation headed by Ashland's chief executive officer visited NIOC in Tehran to discuss the resumption of oil sales to Ashland. On March 11, 1979, a one page handwritten "Heads of Agreement" was signed by Ashland and NIOC officials. This document contemplated the resumption of oil shipments and stated that these sales would be subject to the conditions "as per NIOC standard contract for sales of crude oil" (R. 144).[3] NIOC's standard contract at the time included a broad arbitration provision for resolution of all disputes arising from the commercial transaction.

On April 11, 1979, Ashland and NIOC signed Contract No. 106 which covered crude oil sales and contained the standard arbitration provision (App. 29a-45a, *infra*).[4] Oil shipments were then made and paid for by Ashland. However, toward the end of 1979, oil was delivered to Ashland but no payment was made.

Ashland's refusal to make any payment followed the seizure on November 4, 1979, of United States diplomatic personnel in Tehran. Responsive actions by the United States ensued, including "freezing" all Iranian assets in the United States (31 C.F.R. Part 535). On November 12, 1979, President Carter banned the importation of Iranian oil not already in transit to the United States (44 Fed. Reg. 65581, November 14, 1979). Prior to that date, NIOC had shipped oil to Ashland worth $282,881,712.40. Although no action

---

[3] "R." refers to the record on appeal.

[4] As part of this Agreement, Ashland also waived any claims it might have had under the one-page Heads of Agreement, or any earlier agreement.

by the United States relieved Ashland of its contractual obligations to pay for the oil received, Ashland refined and resold this oil without having paid for it.

Thereafter, NIOC made a demand for arbitration in accordance with Article X of Contract No. 106 (App. 39a, *infra*) which provides, in part, that the seat of arbitration "shall be in Tehran, unless otherwise agreed by the parties." Ashland refused to arbitrate in Tehran. NIOC then offered to arbitrate elsewhere, including the United States. Ashland refused and took the position that, because it is unwilling to arbitrate in Iran, it is altogether relieved of its obligation to arbitrate.

NIOC commenced the proceeding below by filing a complaint in the United States District Court for the Southern District of Mississippi, invoking federal diversity jurisdiction (R. 1-13). The complaint sought, *inter alia*, an order compelling arbitration in accordance with the contract and the United States Arbitration Act, 9 U.S.C. §§ 1, *et seq.* Ashland answered and counterclaimed, alleging that NIOC had breached the March 11 "Heads of Agreement," that any amount it owed NIOC should be set off as a consequence of this breach, and that its counterclaim exceeded NIOC's claims.

NIOC replied to the counterclaim and filed an application pursuant to the Arbitration Act for a stay of the counterclaim, appointment of an arbitrator, and an order compelling arbitration of all disputes raised in the complaint and counterclaim. Ashland opposed the motion. The district court denied the application in all respects (App. 22a-26a, *infra*).

In an opinion that opens with judicial "verse" making light of NIOC's efforts to obtain from Ashland

the quarter billion dollars it owes NIOC, the Court of Appeals for the Fifth Circuit affirmed the holding that the district court could not compel arbitration pursuant to Section 4 of the Arbitration Act. The court ruled that, although Section 4 contains no such limitation on jurisdiction or venue, a "condition" on a district court's authority to compel arbitration is that the district must be the one in which the arbitration agreement provides that the arbitration should occur, unless such a situs provision has been waived by both parties (App. 10a-12a, *infra*). The court found that NIOC could not waive its "right" to the benefit of the forum selection clause "because NIOC has nothing that it could relinquish in a U.S. court" (App. 13a, *infra*). The court also concluded that an order facilitating or encouraging arbitration when parties selected a forum in a country which had not signed the Convention, 21 U.S.T. 2517, 9 U.S.C. §§ 201, *et seq.*, would "do great violence" to the federal policy favoring arbitration (App. 21a, *infra*). The court further decided that Ashland's assertion of "commercial impracticability of arbitrating in Iran did not provide a basis for severing the forum selection clause from the arbitration agreement" (App. 15a-17a, *infra*). This was based entirely on the court's attribution (without evidence or briefing) of actions by the government of Iran to NIOC, an independent juridical entity (App. 17a, *infra*). The court affirmed the denial of NIOC's request for a stay pursuant to Section 3 of the Arbitration Act on the ground that arbitration could not be compelled under Section 4 of the Act.

REASONS FOR GRANTING THE WRIT

A. THE FAILURE TO ENFORCE THE ARBITRATION AGREEMENT CONFLICTS WITH THIS COURT'S DECISIONS CONCERNING INTERNATIONAL ARBITRATION AND THREATENS TO UNDERMINE COMMERCIAL RELATIONS BETWEEN THE UNITED STATES AND A MAJORITY OF ITS TRADING PARTNERS.

The court of appeals' decision is not limited to Tehran, but jeopardizes commercial relations with the majority of United States trading partners which have not signed the Convention—including Brazil, Taiwan, Saudi Arabia and Venezuela. United States' trade with the 91 non-signatories exceeds $90 billion dollars annually.[5] As in this case, many contracts governing this trade have clauses calling for arbitration in a non-Convention country. As a result of the decision below, American companies now can, and likely will, default on their agreements to arbitrate when a dispute arises and thus force litigation of the dispute in a national court system rather than before the arbitral panel agreed to by the parties. This result is wrong and severely disrupts the fabric of international commercial arrangements.

The opinion of the court of appeals defies common sense, is contrary to the Arbitration Act, and conflicts with decisions of this Court repeatedly emphasizing the importance of facilitating international arbitration. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1976); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

---

[5] See United States Department of Commerce, Bureau of Census, "Highlights of U.S. Export and Import Trade," FT990, Tables 5 and 8 (December 1986).

Inc., 473 U.S. 614 (1985). The decision is also contrary to the approach uniformly taken by other courts of appeals in deciding when a forum selection clause may be disregarded in light of its waiver or a change of conditions.

The contract between Ashland and NIOC states that any disputes shall be arbitrated and that the proceeding "shall be in Tehran, unless otherwise agreed by the parties" (App. 39a, *infra*). Ashland has not only refused to arbitrate in Tehran, but also has declined NIOC's offers to arbitrate in London, Bermuda or the United States. Ashland has offered no reason for not arbitrating in any of the latter locales, nor has it proposed any location to which it would agree.

The court below ruled that it could not compel arbitration under Section 4 of the Arbitration Act in Mississippi, where Ashland does business and where NIOC has been forced to go to preserve its claim. The court ruled the arbitration is to be "in accordance with the terms of the agreement" and the agreement calls for arbitration in Tehran. The central rationale for this conclusion was that United States courts should not facilitate any international arbitration originally sited in a country which has not signed the Convention. To do so, said the court of appeals, would be inconsistent with the presumed (and undocumented) Congressional intent that the Convention be the exclusive basis for judicial involvement in or control over international arbitration. Yet, in 1970 when the Convention was presented for the approval of the Senate, members were told that the Convention would supplement the Arbitration Act, not weaken it. Exec. Rep. No. 10, 90th Cong. 2d Sess. 5 (1970) (testimony

of Richard Kearney, Office of the Legal Adviser, Department of State).

Serious damage will result from this decision. The court's treatment of the relationship between the Convention and the Arbitration Act is not correct. Under the Convention, United States courts are directed to compel arbitration in any of the 73 signatory countries, if the arbitration is sited there. 9 U.S.C. § 206. Like the majority of other countries trading with the United States, Iran is not a Convention country. Section 4 of the Arbitration Act, however, antedates and supplements a district court's powers under the Convention; it mandates an order compelling arbitration once the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not at issue. . . ." 9 U.S.C. § 4. In such circumstances (which pertain here) "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . within the district in which the petition for an order directing arbitration is filed." *Id.*

When the Act was passed, the contemporaneous understanding was that the choice of court for filing a Section 4 petition was not governed by an arbitration situs clause in the agreement. Such a provision was not one of the "terms" of the agreement according to which the court-compelled arbitration must proceed. Thus, as stated by the ABA committee largely responsible for proposing and drafting the Act, "the court will issue an order summarily directing the parties to proceed with the arbitration in accordance with the terms of the agreement, except that the proceedings must be within the district in which the petition for the order is filed." Comm. on Commerce,

Trade & Commercial Law, *The United States Arbitration Law and its Application*, 11 A.B.A.J. 153, 154 (1925).[6]

That enforcement of arbitral promises not governed by the Convention is available under the Arbitration Act is confirmed by *Scherk* and *Mitsubishi*. Both decisions rest on the strong federal policy favoring broad enforcement of promises to arbitrate. The purpose of the Act was to overrule "centuries of judicial hostility to arbitration agreements." *Scherk*, 417 U.S. at 510. In the international context, arbitral dispute resolution has special importance. It avoids a judicial forum "hostile to the interests of one of the parties or unfamiliar with the problem area involved,"[7] and minimizes "unseemly and mutually destructive jockeying . . . to secure tactical litigation advantages," a frequent concomitant of transnational litigation. *Id.* at 517. Enforcing arbitral agreements avoids damage to "the fabric of international commerce and trade" which depends upon private arbitration agreements to assure "orderliness and predictability essential to any international business transaction." *Id.* at 516.[8]

---

[6] Under Section 4, "it was possible for a contract to provide for arbitration in Kansas, for example, and for a New York corporation to sue to compel arbitration in New York against a California corporation." *E.C. Ernst, Inc. v. Potlatch Corp.*, 462 F. Supp. 694, 699 (S.D.N.Y. 1978).

[7] Here, the arbitration clause states that arbitrators shall have "broad experience with respect to the petroleum industry practices and oil marketing ..." (App. 39a, *infra*).

[8] More recently, in *Mitsubishi Motors Corp., supra*, this Court reaffirmed that international arbitration promises must be enforced even as to claims not domestically arbitrable. This was

That the arbitration clause here did not site the arbitration in a Convention country does not diminish these policy concerns or make them inapplicable. Indeed, the dispute in *Scherk* was not governed by the Convention. This Court enforced an arbitral promise under the Arbitration Act, not the Convention, noting that the purpose of the Convention was to encourage enforcement of arbitration agreements. *Id.* at 520 n.15. That purpose and the United States' adoption of the Convention reinforced the Court's conclusion that the Arbitration Act must be applied to facilitate, not thwart, arbitration:

> [T]his country's adoption and ratification of the convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today. [*Id.* at 521 n.15.][9]

---

compelled by

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes .... [473 U.S. at 629.]

[9] This view is evidently shared by the United States Government. In *Practical Concepts, Inc. v. Republic of Bolivia*, 613 F. Supp. 863 (D.D.C. 1985), *vacated*, 811 F.2d 1543 (D.C. Cir. 1987), the Department of Justice and the Legal Adviser of the State Department urged the Court as amicus curiae to vacate a default judgment against Bolivia in order to permit Bolivia to assert its defense of arbitration. *Id.* at 1545 n.2, 1552. Bolivia is not, however, a signatory to the Convention nor did the arbitration clause site the arbitration in the territory of a signatory. *See Practical Concepts, supra*, 613 F. Supp. at 871. Accordingly, only the Arbitration Act could have been involved. Equally significant, the Legal Adviser apparently believed that the defense

The Convention thus supports rather than defeats arbitrability here. The court of appeals' use of the Convention to undermine the Arbitration Act's policy of favoring arbitration of international business disputes stands the Act's policy on its head.

Contrary to the approach of other circuits, the Fifth Circuit refused to give weight to these policies in addressing the question of its power to order arbitration where the application to compel arbitration was filed. Courts considering whether to order arbitration where they sit rather than where the arbitration clause provides, uniformly recognize that strict adherence to the forum selection clause is not required. *See Continental Grain Co. v. Dant & Russell, Inc.*, 118 F.2d 967 (9th Cir. 1941); *Snyder v. Smith*, 736 F.2d 409 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Patten Secs. Corp. v. Diamond Greyhound & Genetics, Inc.*, No. 86-5646 (3d Cir. May 21, 1987).

Whether called a "waiver" of the right to insist on a strict construction of the forum selection clause, a practical assessment that conditions can arise making strict enforcement of the forum clause unreasonable or a finding that a forum selection clause[10] "does not enjoy" as much "federal favor as an agreement to arbitrate," courts have found that the arbitration promise and procedure is the key undertaking, not the selection of the place of arbitration. *Id.* slip op. at 13. The court below ignored this entirely in ruling that arbitration must be in Tehran or nowhere. The

---

might have merit. Otherwise, there would have been no point in allowing it to be revived upon vacation of the default.

[10] In federal court litigation, venue can be waived. There is no reason to treat an arbitration site differently.

decision below gives other companies incentives to follow Ashland's example, thereby undermining the policy favoring international arbitration. The revision of that policy, particularly in light of the importance of the trade involved, is a matter warranting review by this Court.

B. THE DECISION BELOW IS IRRECONCILABLE WITH DECISIONS OF THIS COURT AND THE PURPOSES OF THE FOREIGN SOVEREIGN IMMUNITIES ACT, AND JEOPARDIZES INTERNATIONAL COMMERCE INVOLVING UNITED STATES CORPORATIONS.

The court of appeals held that NIOC was "part of the revolutionary Government," and consequently, NIOC could not rely on the alleged commercial impracticability of arbitrating in Iran in order to sever the forum selection clause from the arbitration agreement: NIOC "certainly bears responsibility for creating the chain of events making it impossible" for Ashland to arbitrate in Iran (App. 17a, *infra*).[11] The statement that NIOC is "part" of the Iranian government and not a separate juridical entity was made without the benefit of briefing or legal argument, and without discussion of, or even any citation to the controlling decisions of this Court.[12] The only pertinent fact of record is that NIOC is a separate juridical entity, incorporated under the laws of Iran (R. 2, 53).

---

[11] In fact, as NIOC pointed out in seeking rehearing, it was Ashland, not NIOC, which invoked the defense of impossibility with regard to arbitration in Tehran (Amended Answer ¶ 17, R. 55).

[12] In seeking rehearing, NIOC noted the contrary decisions of this and other courts, but the appeals court did not address them.

By holding NIOC responsible for the actions of Iran, the court of appeals set itself squarely at odds with this Court's decision in *First National Citibank v. Banco Para el Comercio*, 462 U.S. 611 (1983) ("*Bancec*"), and every subsequent court of appeals that has addressed the issue. The decision below is also contrary to the intent of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.*, and sets a precedent that will allow foreign courts likewise to conclude, without evidence, that related but juridically distinct United States corporations are responsible for the actions of each other, despite their separate legal personality or, further, that the United States is itself legally responsible for the actions of its corporate instrumentalities.

In *Bancec*, this Court established a strong presumption in favor of the separate legal status of a foreign state's commercial instrumentality.[13] "Freely ignoring the separate status of government instrumentalities," would in the long run frustrate "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration ...." *Id.* at 626. Accordingly, "government instrumentalities established as juridical entities distinct and independent from their sovereign should

---

[13] The dissent agreed with the majority that law and international comity required that there be a presumption that such instrumentalities could not automatically be found responsible for the acts of the government. The dissent, however, would have remanded to gather more evidence on the operational autonomy of the entity there at issue. 462 U.S. at 634.

normally be treated as such." *Id.* at 626-27 (footnote omitted).[14]

The Fifth Circuit's decision is also flatly inconsistent with recent rulings in other circuits applying *Bancec*. In *Hercaire International, Inc. v. Argentina*, Nos. 86-5264, 86-5317 (11th Cir. July 14, 1987), and *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985), courts found that instrumentalities of Argentina and Chile, respectively, enjoyed a "presumption of independent status" (*Bancec*, 462 U.S. at 627) which had not been overcome. *Hercaire*, slip op. at 3520; *Letelier*, 748 F.2d at 794.

The presumption of separateness is reinforced by the Immunities Act. Congress sought to assure that the Immunities Act mirrored the distinction drawn by foreign law between a state trading corporation and the foreign state itself: "If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary." H.R. Rep. No. 1487, 94th Cong. 2d Sess. 29 (1976), reprinted in (1976) U.S. Code Cong. & Ad. News 6604, 6628.

This Court and the Eleventh and Second Circuits have held that the presumption of independent status may not be lightly overcome. *Letelier*, 748 F.2d at

---

[14] While in *Bancec* the presumption of separate legal status was overcome by the facts of record, the ruling underscores the absence of a solid legal or factual underpinning to sustain the court of appeals' conclusion that NIOC should be held responsible for Iran's alleged activities.

795; *Hercaire*, slip op. at 3521.[15] In contrast, neither court below made evidentiary findings on this point; instead, the court of appeals actually reversed the presumption, equating NIOC and the government of Iran absent *any* evidence to that effect.

The decision below cannot be dismissed as an inconsequential aberration. If United States courts fail to draw a hard and fast distinction between a foreign government and its independent entities, the United States cannot object when foreign courts do the same and pierce the corporate veil between a United States corporation and its foreign subsidiary—the precise situation the drafters of the Foreign Sovereign Immunities Act sought to prevent. Relying on the decision below, foreign courts may also disregard the separate identity of a United States agency or instrumentality and hold the United States directly liable for the acts of its instrumentalities doing business abroad and vice versa.[16]

---

[15] *See also Czarnikow Ltd. v. 'Rolimpex'*, (1979) A.C. 351, referred to by this Court in Bancec, 462 U.S. at 627 n.18, presenting another context in which the issue of separate identity between a foreign state and its wholly-owned entity is important—force majeure. In *'Rolimpex'*, the English House of Lords determined that a Polish trading company could rely on the force majeure clause of a contract when the Polish government barred all export of the sugar the trading company had contracted to sell.

[16] For example, the Commodity Credit Corporation, an agency and instrumentality of the United States, is responsible for export sales of commodities and financing of such sales (15 U.S.C. § 714). If a dispute should arise from a transaction between the Commodity Credit Corporation and a foreign purchaser, the decision here may subject the United States to a set-off based on a foreign buyer's claims against an unrelated United States' instrumentality.

The court of appeals' disregard for NIOC's separate juridical existence is important because it will result in increased uncertainty regarding the status of independent government entities and has the potential to seriously disrupt commercial dealings involving them. Government corporations such as NIOC are prevalent in the developing nations in Latin America, Africa and Asia, including politically diverse countries such as Brazil, Argentina, Kenya and Indonesia. Such corporations number in the thousands.[17] United States companies transact business with these entities daily. The court of appeals' disregard for the separate juridical status of such entities, therefore, could lead to a chain-reaction which would seriously disrupt international trade. For this reason, the United States participated as amicus curiae in *Bancec*, asserting that the independence of separate juridical entities "is a matter of great political sensitivity in our relations with foreign states." Brief for the United States as Amicus Curiae, *First Nat'l City Bank v. Banco Para el Comercio*, Oct. Term 1982, No. 81-984, p. 12.

The decision below thus is not only incorrect, but also is likely to lead to adverse political and commercial consequences. If allowed to stand, it will subvert this Court's decision in *Bancec* and the purposes of the Foreign Sovereign Immunities Act. Therefore, this Court should grant review.

---

[17] See Brief for Respondent, *First Nat'l City Bank v. Banco Para el Comercio*, Oct. Term 1982, No. 81-984, p. 11 and appendix thereto.

C. THE DENIAL OF A STAY UNDER SECTION 3 OF THE ARBITRATION ACT IS CONTRARY TO LONGSTANDING AND CONTROLLING DECISIONS OF THIS COURT AND IS A SERIOUS THREAT TO THE FEDERAL POLICY FAVORING ARBITRATION.

The sole reason stated by the district court for denying NIOC's application to stay litigation of Ashland's counterclaims pursuant to Section 3 of the Arbitration Act, 9 U.S.C. § 3, was the court's determination that it could not compel arbitration in Mississippi under Section 4 of the Act, 9 U.S.C. § 4 (App. 22a-26a, *infra*.). Without further analysis or discussion, the court of appeals agreed (App. 4a-21a, *infra*). That decision conflicts with the plain command of Section 3 which provides that a district court "shall" stay "any" suit or proceeding if "the issue involved in such suit or proceeding is referable to arbitration," 9 U.S.C. § 3,[18] and with the equally clear holding of this Court in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935).

The rationale of the courts below for denying the stay—that they could not compel arbitration in Mississippi—was considered and rejected by this Court more than 50 years ago in *Shanferoke*. The Court there held "that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance

---

[18] The only exception is where the applicant for the stay is in default in proceeding with the arbitration. NIOC has vigorously sought arbitration, and neither the district court nor the court of appeals found it to be in default.

with section 4 of the act ...." *Id.* at 453. This holding remains unquestioned and vital to this day.

The power of a court to grant a stay under Section 3, even if it cannot also compel arbitration is essential to further the federal policy of encouraging arbitration, particularly in context of international commercial disputes. *See Mitsubishi Motors v. Soler Chrysler-Plymouth, supra; Scherk v. Alberto-Culver Co., supra.* If the decision below stands, it will encourage parties to resist arbitration. In essence, the decision eviscerates Section 3 of the Act and allows recalcitrant parties to resist arbitration indefinitely, and thus force court litigation upon the party with whom it agreed to arbitrate.

The Court should grant certiorari to reconfirm the importance of Section 3 of the Arbitration Act for domestic and international arbitration agreements.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN M. TRUITT
Counsel of Record
MARK SCHATTNER
SUSAN L. LAUNER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006-5203
(202) 842-8100

ALEX A. ALSTON, JR.
CHARLES R. DAVIS
THOMAS, PRICE, ALSTON,
JONES & DAVIS
121 North Street
Jackson, Mississippi 39215-1532
(601) 948-6882
Counsel for Petitioner

Dated: September 17, 1987

APPENDIX

APPENDIX A

STATUTORY PROVISIONS INVOLVED

9 U.S.C. §2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court

which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. §5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

APPENDIX B

United States Court of Appeals
Fifth Circuit

NATIONAL IRANIAN OIL COMPANY,
Plaintiff-Appellant,
v.
ASHLAND OIL, INC.,
Defendant-Appellee.
No. 86-4486

May 21, 1987

Iranian oil supplier applied for appointment of arbitrator and to compel arbitration. The United States District Court, Southern District of Mississippi, Tom S. Lee, J., 641 F.Supp. 211, held that court was not empowered to compel arbitration in Mississippi, in view of forum selection clause in parties' contract requiring arbitration in Iran. Oil supplier appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) district court's interlocutory order was reviewable by Court of Appeals on direct appeal; (2) Iranian supplier could not use doctrines of impossibility or commercial impracticability, in order to vitiate forum selection clause in its contract with American oil company and thereby compel company to arbitrate dispute in forum other than that specified in contract; (3) agreement to arbitrate was not "entire" and "severable" from forum selection clause; and (4) court could not provide arbitration situs within its district, absent contractual provision so indicating.

Affirmed.

Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, GOLDBERG and GEE, Circuit Judges.

GOLDBERG, Circuit Judge:

There was an oil company from Iran
whose lawyers devised a neat plan:
To arbitrate a dispute
that Ashland's contract might refute,
the Iranians to the land of cotton ran.

But their clever arbitration plan was spoiled;
by an Act of Congress, the district court said, it was foiled.
So they take this appeal
to rewrite their first deal.

But their theories are only half-boiled.
To arbitrate in Ole Miss is their prayer.
Inconvenience or waiver makes it fair.
But the contract is clear.
we can't order arbitration here.
Unless agreed, it's Iran or nowhere.

I.

According to the allegations contained in the pleadings and accompanying memoranda, two Ashland Oil Company (Ashland) subsidiaries, Ashland Overseas Trading Limited (AOTL) and Ashland Bermuda Limited began to use the National Iranian Oil Company (NIOC), an instrumentality of the Islamic Republic of Iran, as their primary supplier of Middle Eastern crude oil in 1973. The parties entered into long term contracts. Amid the maelstrom of chaos and confusion engendered during the Islamic Revolution in Iran, NIOC allegedly repudiated then renegotiated its contracts with Ashland's two subsidiaries on several occasions in 1978 and 1979. On March 11, 1979, the parties allegedly entered into a two-year, nine-month contract, providing that NIOC was to supply AOTL with 150,000 barrels of crude oil per day. NIOC allegedly repudiated this March contract on April 10, 1979. On April 11, the

parties allegedly executed a new contract, providing that NIOC was to supply AOTL with 115,000 barrels of crude per day until December 31, 1979.

On November 12, 1979, following the takeover of the American Embassy in Tehran and the seizure of American hostages on November 4, President Carter banned the importation of all oil from Iran not already in transit. Exec. Order No. 4702, 44 Fed.Reg. 65581 (November 16, 1979). Several cargoes of crude, however, were then en route to AOTL. AOTL received and refined the oil, worth nearly $283,000,000. Despite NIOC's demand, neither Ashland nor its subsidiaries have rendered payment. Ashland, in essence, contends that it is not responsible for the alleged breaches of its subsidiaries and that NIOC itself breached the March and April agreements.

In accord with the terms of the arbitration clause of the parties' April contract, NIOC appointed an arbitrator to resolve the dispute. Despite the forum selection clause contained in the arbitration provision, Ashland refuses to participate in an arbitral proceeding in Iran because of the danger to Americans. Nor has Ashland agreed to participate in an arbitration elsewhere. NIOC thus brought suit against Ashland in federal district court, and alleged breach of contract in the first three counts of its complaint. In count four of its complaint, NIOC sought to compel arbitration in Mississippi, to have the court appoint an arbitrator and to stay litigation pursuant to the United States Arbitration Act (Act), 9 U.S.C. § 1 *et seq.*

Ashland then filed a counterclaim, alleging tortious interference with and breach of contract by NIOC. NIOC responded to the counterclaim by filing an application that also sought to appoint an arbitrator, to compel arbitration, and to stay litigation. Because the terms of the agreement expressly provided for arbitration in Tehran, the district court found that it lacked the power to order arbitration in Mississippi under section 4 of the Act, and thus it denied

NIOC's motion. 641 F.Supp. 211 (S.D.Miss.1986). NIOC appeals from that order.

On appeal, NIOC points to the strong federal policy favoring the private resolution of contract disputes, particularly in the international commercial context, and argues that we should reverse the district court and order arbitration in Mississippi because the parties have "waived" the forum selection clause in the contract. Alternatively, NIOC contends that, because it is now impossible to render performance of the contract's terms, we should sever the forum selection clause from the rest of the arbitration provision and order Ashland to perform the essential part of their bargain, *viz.*, to arbitrate. Finding no merit to these contentions, we affirm the district court's judgment on other grounds. Not only justice and sound policy, but also the law prevents NIOC from holding Ashland hostage to an agreement not contemplated *ex ante*.

II.

We must first address Ashland's argument that the district court's decision declining to compel arbitration and to stay litigation is not an appealable order under 28 U.S.C. § 1292(a)(1)[1] This contention is without merit.

Ashland bases its argument on the much criticized[2] and archane intricacies of the *Enelow-Ettelson* doctrine. *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440 (1935); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188, 63 S.Ct. 163, 87 L.Ed. 176 (1942); *see Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 75

---

[1] 28 U.S.C.§ 1292(a)(1) provides in pertinent part that the courts of appeals have jurisdiction over "[i]nterlocutory appeals of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ."

[2] *See, e.g., Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 732 F.3d 444, 445-47 (5th Cir. 1984) (Rubin, J., dissenting).

S.Ct. 249, 99 L.Ed. 233 (1955). This murky and swamp-like doctrine, mired in a bog of antiquarian fictions requiring distinction of actions at law from actions in equity, provides that if a party sets up an equitable defense to an action at law, an order of the district court granting or denying a stay of the proceedings is in effect an appealable interlocutory injunction under 28 U.S.C. § 1292(a)(1). *Ettelson*, 317 U.S. at 191-92, 63 S.Ct. at 164-65.

In *Jackson Brewing Co. v. Clarke*, 303 F.2d 844 (5th Cir.), *cert. denied*, 371 U.S. 891, 83 S.Ct. 190, 9 L.Ed.2d 124 (1962), we established a two-part test for determining whether an order granting or denying a stay is appealable:

> An order staying or refusing to stay proceedings in the District Court is appealable under § 1292(a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; *and* (B) the stay was sought to permit the prior determination of some *equitable* defense or counterclaim.

Id. at 845 (emphasis in original) (citations omitted). *See also Municipal Energy Agency v. Big Rivers Electric Corp.*, 804 F.2d 338, 341 (5th Cir.1986); *Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334, 336-37 (5th Cir.1984).

Ashland properly concedes that the underlying cause that is the subject of this appeal—an action for breach of contract—is an action at law, thus satisfying the first prong of the *Jackson Brewing* test. Moreover, arbitration proceedings are by nature equitable. *See, e.g., Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 55 S.Ct. 313, 314 79 L.Ed. 583 (1935); *Municipal Energy Agency*, 804 F.2d at 341. Thus, "[i]t is clearly settled that, when a stay of proceedings is granted or denied in a contract action . . . pending arbitration proceedings . . . the order falls within the [*Jackson Brewing*] rule and is appealable." *Teneco Resins, Inc. v. Davy Intern., AG*, 770

F.2d 416, 418-19 (5th Cir.1985) (citations omitted); *see Phillips Petroleum Co. v. Marathon Oil Co.*, 794 F.2d 1080, 1081 (5th Cir.1986); *Houston General Ins. Co. v. Realex Group, N.V.*, 776 F.2d 514, 515 (5th Cir.1985) (collecting cases).

Ashland, however, argues that the second prong of the test is not met here because NIOC seeks to stay its own suit, in count four of the complaint. Ashland would have us conclude that NIOC seeks to stay the litigation based on an *affirmative* assertion of arbitration, not based on an equitable *defense*, and therefore that the interlocutory order of the district court is not appealable.

Ashland relies on *Turkish State Railways Administration v. Vulcan Iron Works*, 230 F.2d 108 (3d Cir. 1956). In holding that the plaintiff's attempt to stay litigation pending arbitration was not appealable, the Third Circuit reasoned that "[t]o suggest that a plaintiff may invoke a chancellor's aid to enjoin himself from prosecuting his own lawsuit is a novel doctrine, too unrealistic for serious consideration." *Id.* at 110; *see Jackson Brewing Co.*, 303 F.2d at 846 (citing *Turkish State Railways* with approval in dicta). Ashland's reliance on this case is misplaced. However viable *Turkish State Railways* may be in this circuit, a question we leave for another day, the present case is distinguishable.

NIOC is like Hermaphroditus. Because Ashland responded to NIOC's initial complaint by filing a counterclaim, NIOC is not simply plaintiff *or* defendant, but is simultaneously both plaintiff *and* defendant in the body of the same suit. It is true that NIOC requested arbitration and a stay of the litigation in its complaint. But in response to Ashland's counterclaim, which is by nature an action at law, NIOC filed an application to appoint an arbitrator, to compel arbitration and to stay litigation. It was this application, not the initial complaint, that the district court ruled upon and that is the subject of this

appeal. Thus, because NIOC seeks, in part, to compel arbitration and to stay litigation in defense to Ashland's counterclaim, we have jurisdiction to review the district court's interlocutory order denying this motion under 28 U.S.C. § 1292(a)(1).

III.

Section 4 of the Act provides in relevant part that:

> A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner *provided for in the agreement.* . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.* The hearing and proceedings, under such agreement, *shall be within the district in which the petition for an order directing such arbitration is filed.*

9 U.S.C. § 4 (emphasis added). Section 4 thus facially mandates that two conditions must be met before a district court may compel arbitration: (1) that the arbitration be held in the district in which the court sits; *and* (2) that the arbitration be held in accordance with the agreement of the parties. In this case the forum selection clause, found in Article X of the April contract, provides that "the seat of arbitration shall be in Tehran, unless otherwise agreed by the parties." Rec. at 28. Relying on *Snyder v. Smith*, 736 F.2d 409 (7th Cir.), *cert. denied*, 469 U.S. 1037, 105 S. Ct. 513, 83 L.Ed.2d 403 (1984), the district court reasoned that the language of Section 4 deprived it of the power to compel arbitration in Mississippi, because to order arbitration in Mississippi would violate the forum

selection clause and thus would not be "in accordance with the terms of the agreement." 9 U.S.C. § 4.

In *Snyder*, the Seventh Circuit reversed an order of the district court ordering arbitration in its district in the face of a forum selection clause designating Houston, Texas as the agreed-upon site of any arbitral proceeding. The court reasoned that section 4 mandates that arbitration be compelled only in accord with the terms of the contract, and one "term of the agreement" was the forum selection clause.

> The right and duty to arbitrate disputes is purely a matter of contractual agreement between the parties. . . . An arbitration agreement, including its forum selection clause is a freely-negotiated contract between the parties. Courts must give effect to such freely negotiated forum selection clauses.

Id. at 419 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-18, 92 S.Ct. 1907, 1916-18, 32 L.Ed.2d 513 (1972)); *see Lafayette Coal Co. v. Gilman Paper Col*, 640 F.Supp. 1 (N.D.Ill.1986); *Joo Seng Hong Kong Co. v. S.S. Unibulkfir*, 493 F.Supp. 35 (S.D.N.Y.1980); *see also Econo-Car International, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391, 1394 (3d Cir.1974) (court is statutorily proscribed by section 4 from ordering arbitration outside its district to comport with forum selection clause providing for arbitration in another district); *Continental Grain Co. v. Dant & Russell, Inc.*, 118 F.2d 967 (9th Cir.1941) (same); *Cardona Tirado v. Shearson Lehman American Express, Inc.*, 634 F.Supp. 158, 161 (D.P.R.1986) (same); *Couleur International, Ltd. v. Saint-Tropez West, Division of California Industries, Inc.*, 547 F.Supp. 176, 177-89 (S.D.N.Y.1982) (same).

Apparently contrary to some other courts, we have not taken such a literal approach to the two part mandate of section 4. In *Dupuy-Busching General Agency, Inc. v. Ambassador Ins. Co.*, 524 F.2d 1275 (5th Cir.1975) (per cur-

iam), a party to a contract containing a forum selection clause providing for arbitration in New Jersey brought suit in Mississippi requesting the court to enjoin arbitration. The district court ordered arbitration in New Jersey, and we affirmed the order of the district court compelling arbitration outside its own district. We did so, however, in accord with the forum selection clause. Noting the tension in the two conditions of section 4, we reasoned that "where a party seeking to avoid arbitration brings a suit for injunctive relief in a district court other than that in which arbitration is to take place . . . the party seeking arbitration may assert its section 4 right to have the arbitration performed in accordance with the terms of the agreement." *Id.* at 1278; *see also Continental Grain*, 118 F.2d at 969 (ordering arbitration in its own district despite forum selection clause designating New York as the situs of arbitral proceedings, because the plaintiff effectively waived the forum selection clause by bringing suit in Oregon seeking to compel arbitration in New York).

Thus, *Dupuy-Busching* suggests that the language of section 4 need not be applied literally, that there may be some cases in which district courts are empowered to compel arbitration notwithstanding the parties' contractually established forum or outside of the district in which the courts sit. *See Municipal Energy Agency*, 804 F.2d at 344. But this is not such a case. By bringing suit in a district other than the district designated in the forum selection clause, the plaintiff in *Dupuy-Busching* in effect had waived the right to its bargain. Contrary to NIOC's contention, there has been no such waiver here.

NIOC contends that since it is not seeking to compel arbitration in Iran, it has waived its right to the benefit of the forum selection clause. Further, NIOC argues that Ashland also has waived the "benefit" of such clause by refusing to participate in an arbitral proceeding in Tehran or elsewhere. NIOC therefore concludes that, because the putative waivers render the forum selection clause nuga-

tory, we are free to order arbitration in Mississippi without contravening the contract's terms. This argument rings hollow.

In the first place, as NIOC now concedes, it has no right to an order compelling arbitration in Tehran. When the United States adhered to the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970) (implemented by chapter 2 or 9 U.S.C.), U.S. courts were granted the power to compel arbitration in signatory countries. *See* 9 U.S.C. § 206. But Iran is not one of the 65 nations that have adhered to the Convention, *see* note following 9 U.S.C.A. § 201 at 208-09 (Supp.1986), and thus no American court may order arbitration in Iran. Convention Articles I(1), I(3); Declaration of the U.S. upon accession (Declaration), reprinted in 9 U.S.C.A. at 213 n. 43 (Supp. 1986); *see Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co. (Pemex)*, 767 F.2d 1140, 1145 (5th Cir.1985); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-86 (1st Cir.1982). Consequently, NIOC has no right that is recognized under U.S. law to compel an arbitration in Iran.

Because a waiver is a voluntary relinquishment of a known right, *see, e.g., Watkins v. Fly*, 136 F.2d 578, 580 (5th Cir.) (on petition for rehearing), *cert. denied*, 320 U.S. 769, 64 S.Ct. 80, 88 L.Ed. 459 (1943); *Restatement (Second) of Contracts* § 84, comment b (1981), and because NIOC has nothing that it could relinquish in a U.S. court, NIOC could not have waived its "right" to the benefit of the forum selection clause. Moreover, Ashland contends and NIOC does not dispute that NIOC has attempted, and still may be attempting, to compel arbitration through the court system in Iran. Thus, NIOC has not waived its contractual right to arbitration in Iran. NIOC, at most, simply and pragmatically has recognized that it has no legal right in the U.S. courts to compel arbitration in Tehran.

IV.

NIOC also argues that, because it may be "inconvenient" for Ashland to participate in an arbitral proceeding in Iran, this impossibility (or commercial impracticability) renders the forum selection clause without force. Appellant's brief at 23. NIOC, relying on *Snyder*, 736 F.2d at 419, and *The Bremen*, 407 U.S. at 10-12, 92 S.Ct. at 1913-14, therefore asserts that the forum selection clause should be severed and Ashland compelled to perform the essential term of the bargain, *viz.*, to participate in an arbitral proceeding (in Mississippi). This syllogism too is fatally flawed.

In *The Bremen*, 407 U.S. at 10-12, 92 S.Ct. at 1913-14, the Supreme Court held, in the context of an international admiralty dispute, that forum selection clauses must be strictly enforced, unless the enforcement would be "unreasonable," or unless the resisting party could show "countervailing" or "compelling" reasons why it should not be enforced. But the forum selection clause at issue in *The Bremen* did not relate to the choice of *situs* in an arbitral proceeding, rather it related to the parties' contractual choice of arbitration as opposed to litigation to resolve its disputes. Thus, in *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir.1976), we held that the test in *The Bremen* was inapposite respecting the enforcement of the choice of situs expressed in an arbitration agreement. In *Reisfeld*, a U.S. company argued that a forum selection clause designating Belgium as the situs of arbitration should not be enforced because "it is so unreasonable that it either vitiates the arbitration clause altogether or requires a transfer to a more neutral situs." *Id.* at 680. We held that the forum selection clause contained in an arbitration provision must be enforced, even if unreasonable. A forum selection clause establishing the situs of arbitration must be enforced unless it conflicts with an "explicit provision of the Federal Arbitration Act." *Id.* at 680-81.

> Under the Act, a party seeking to avoid arbitration must allege and prove that the arbitration clause itself was a product of fraud, coercion, or "such grounds as exist at law or in equity for the revocation of the contract."

Id. at 681 (quoting 9 U.S.C. § 2) (citing *Prima Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). *See Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 11, 104 S.Ct. 852, 861 n. 11, 79 L.Ed.2d 1 (1984); *Spring Hope Rockwool, Inc. v. Industrial Clean Air, Inc.*, 504 F.Supp. 1385, 1389-90 (E.D.N.C. 1981); *Joo Seng Hong Kong*, 493 F.Supp. at 42; *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270 (1974) (footnote omitted) ("the agreement of the parties . . . to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act."). NIOC does not assert that it has been a victim of fraud or coercion, and its assertion of inconvenience or impossibility fails as a "legal ground" for vitiating the freely chosen forum selection clause.

Under traditional principles of contract law, NIOC's argument that the political atmosphere in Iran renders arbitration there impossible or impracticable certainly supplies an adequate predicate for finding the forum selection clause uneforceable and without effect. *See, e.g., Restatement (Second) of Contracts*, at § 264; U.C.C. 2-615 & comment 4; *see generally* A. Farnsworth, *Contracts* § 95 (1982). "Where only part of the obligor's performance is impracticable his duty to render the remaining part is unaffected if . . . it is still practicable for him to render performance that is substantial." *Restatement (Second) of Contracts* at § 270; *see, e.g., Net Realty Holding Trust v. Franconia Properties, Inc.*, 544 F.Supp. 759, 769 (E.D.Va. 1982). But impracticability is an argument upon which NIOC may not rely.

In order to assert the doctrine of impossibility or commercial impracticability, the party wishing to assert such a defense must meet two conditions. First "[t]he affected party must have no reason to know at the time the contract was made of the facts on which he [or she] relies." *Restatement (Second) of Contracts* at § 266, comment a; *see, e.g., Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 988, 991-92 (5th Cir.1976); *Waldinger Corp. v. CRS Group Engineers, Inc.*, 775 F.2d 781, 786 (7th Cir.1985); *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 149-50 (6th Cir.1983); *Asphalt International, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261, 265 (2d Cir.1981). That NIOC—an instrumentality of the Islamic Republic of Iran—could not reasonably have foreseen in April 1979 that an American entity might find it impracticable to participate then or in the near future in an arbitral proceeding in Tehran defies credulity.

By January 16, 1979, the Shah had departed, and by February 1, the Ayatollah Khomeini had returned triumphantly to Iran. On February 14, the American Embassy was attacked for the first time, killing one Iranian civilian employee, wounding an American Marine, and taking some 100 Americans hostage, including Ambassador Sullivan, for approximately two hours. In short, by April 1979, when the contract was executed, the revolutionary government was in place—the same government that took power largely by "mobilizing millions of Iranians against an American equated with satan." B. Rubin, *Paved With Good Intentions: The American Experience and Iran* 255 (1980). Thus, it simply is unimaginable that NIOC, part of the revolutionary government, could not reasonably have foreseen that Tehran would become a forum in which it is undisputably impossible for Americans to participate in any proceedings. *See, e.g., McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 345-46 (8th Cir.1985) (taking judicial notice of the grave difficulties that would con-

front an American entity were it forced to litigate a dispute in Iran, and collecting cases).

Second, a party may not rely on the doctrine of impossibility or impracticability "[i]f the event is due to the fault of the . . . [party] himself." *Restatement (Second) of Contracts* at § 261, comment d; *see, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 767 & n. 10, 103 S.Ct. 2177, 2184 & n. 10, 76 L.Ed.2d 298 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. B.C. Rogers & Sons, Inc.*, 696 F.2d 1113, 1115 (5th Cir.1983). Simply put, "a party may not affirmatively cause the event that prevents . . . [the] performance." *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1540 (5th Cir. 1984). Yet, as part of the revolutionary Government, NIOC certainly bears responsibility for creating the chain of events making it impossible for an American entity reasonably to travel to and to engage in quasi-judicial proceedings in Iran. Thus, NIOC cannot assert the doctrine of impossibility.

Even were NIOC able to rely on the fact that it is now impossible for Ashland to arbitrate in Iran, thus vitiating the forum selection clause, NIOC must show that the venue provision is severable from the rest of the arbitration agreement. Whether the agreement to arbitrate is entire or severable turns on the parties' intent at the time the agreement was executed, as determined from the language of the contract and the surrounding circumstances. *See, e.g., Prospero Associates v. Burroughs Corp.*, 714 F.2d 1022, 1026-27 (10th Cir.1983); *Pollux Marine Agencies, Inc. v. Louis Dreyfus Corp.*, 455 F.Supp. 211, 219 (S.D.N.Y.1978). NIOC must therefore show that the essence, the essential term, of the bargain was to arbitrate, while the situs of the arbitration was merely a minor consideration. *See Restatement (Second) of Contracts* at § 184, comment a; § 185(1) & comment b.

But the language of the standard form document—drafted by NIOC—belies any such argument. Not only did NIOC choose Tehran as the site of any arbitration, but the contract also provides that Iranian law governs the interpretation and rendition of any arbitral awards. The arbitration agreement also provides that, should one of the parties fail to appoint an arbitrator or should the two arbitrators fail to agree on a third arbitrator, "the interested party may request the *President of the Appeal Court of Tehran* to appoint the second arbitrator or the third arbitrator as the case may be." Rec. at 27 (emphasis added). Indeed, the contract expressly provides that the entire agreement is to be interpreted by reference to Iranian law. The language of the contract thus makes self-evident the importance of Iranian law and Iranian institutions to NIOC. Therefore, the document plainly suggests that the situs selection clause was as important to NIOC as the agreement to resolve disputes privately through arbitration. The language of the contract demonstrates that the parties intended the forum selection clause and the arbitral agreement to be entire, not divisible.

Finally, even were the forum selection clause severable, we are still not informed how the parties intended to arbitrate in *Mississippi*. NIOC contends, somewhat disingenously, that because Ashland's corporate offices are in Kentucky, Jackson is far more convenient to Ashland than NIOC. But NIOC does not dispute Ashland's allegation that NIOC ran to Mississippi because it is one of the few jurisdictions with a six-year, rather than four-year, limitations period for contracts' claims. Thus, by filing when it did in Mississippi, NIOC was able to assert its claim before the statute of limitations had run, and simultaneously to argue that the statute of limitations had run on Ashland's counterclaim, which had accrued earlier.

Notwithstanding considerations of "convenience," one cannot reasonably argue that the parties' contract contemplates arbitration in Mississippi. The contract's provision

that arbitration was to be in Tehran "unless otherwise agreed" suggests that, were Iran to become inconvenient or unacceptable to one or both parties, no other forum was to be available unless mutually agreed upon. Because arbitration is a creature of contract, we cannot rewrite the agreement of the parties and order the proceeding to be held in Mississippi. *See, e.g., AT & T Technologies, Inc. v. Communication Workers,* ___*U.S.* ___, ___, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986); *International Association of Machinists and Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., Inc.,* 812 F.2d 219 at 220 (5th Cir. 1987); *Williams v. E.F. Hutton & Co.,* 753 F.2d 117, 119 (D.C.Cir.1985).

NIOC could have chosen to negotiate a forum selection clause with a situs in any one of the 65 nations that are signatories to the Convention, thereby permitting extra-territorial enforcement by U.S. courts. It also could have selected any one of 50 states in this country in which we could have compelled Ashland to arbitrate. But it did not. It selected a situs that was unenforceable *ab initio,* and we have no statutory or equitable mandate that allows us to redraft the agreement premised on convenience of the parties *ex post. See Prima Paint,* 388 U.S. at 404, n. 12, 87 S.Ct. at 1806 n. 12 (purpose of Act "was to make arbitration agreements as enforceable as other contracts, but not more so."); *Robin v. Sun Oil Co.,* 548 F.2d 554, 557 (5th Cir.1977) (courts may not redraft the parties' agreement in the absence of clear and convincing evidence of mutual mistake).

V.

NIOC points to the weighty congressional policy favoring the use of arbitration if the parties have contractually agreed to resolve their disputes in this manner. *See, e.g., Dean Witter Reynolds, Inc. v. Boyd,* 470 U.S. 213, 219-222, 105 S.Ct. 1238, 1242-43, 84 L.Ed.2d 158 (1985); *Southland Corp.,* 465 U.S. at 10, 104 S.Ct. at 858 (1984);

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 22 n. 7, 23, 103 S.Ct. 927, 940 n. 7, 941, 74 L.Ed.2d 765 (1983). This policy acquires special significance in the international context where because of transnational fora and concomitant conflicts of laws problems, arbitration appears a more inviting forum. *See, e.g., Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, ___- ___, 105 S.Ct. 3346, 3353-54, 87 L.Ed.2d 444 (1985); *Scherk*, 417 U.S. at 515-16, 94 S.Ct. at 2455-56; *The Bremen*, 407 U.S. at 12-14, 92 S.Ct. at 1915; *see generally* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049 (1961). Thus, there is a strong, congressionally ordained presumption in favor of arbitrability. Therefore, we have repeatedly held that "arbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.' " *Phillips Petroleum*, 794 F.2d at 1081 (quoting *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979)). At the same time, a corollary "of th[is] principle[] is that the duty to submit a dispute to arbitration arises from contracts, therefore a party cannot be compelled to arbitrate a dispute if he has not agreed to do so." *Lodge No. 2504*, at 221; *see also* H.R.Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) ("Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.") H.R. Rep. No. 91-702, 91st Cong., 2d Sess. 6 (1970) (bill implementing the Convention has the same purpose). Thus, NIOC's appeal to congressional policy will not suffice to transform the plain words of the parties' agreement to arbitrate in Tehran, Iran to arbitrate in Jackson, Mississippi.

There is also a countervailing policy concern evoked by this case. When the United States adhered to the Convention, it expressly chose the option available in Article

I(3), to "apply the Convention, on the basis of reciprocity, to the recognition and enforcement of *only* those awards made in the territory of another Contracting State." Declaration (emphasis added). While the House and Senate Committee reports do not inform us as to the purpose of adopting this reservation, its purpose seems obvious. Concerned with reciprocity, Congress must have meant only to allow signatories to partake of the Convention's benefits in U.S. courts and thus to give further incentives to non-signatory nations to adhere to the Convention. Were we now to order arbitration in Mississippi, despite the forum selection clause designating Tehran as the site of arbitration, we would do great violence to this obvious congressional purpose. Were we to order arbitration in the U.S. in the face of a forum selection clause designating a non-signatory forum, which was unenforceable *ab initio*, the non-signatory would have little reason to leave the Hobbesian jungle of international chaos for the ordered and more predictable world of international commercial law.

Conclusion

NIOC now seems to prefer the relative quiescence of the distant Mississippi to the proximate turbulence of the Persian Gulf. But there is neither doctrine nor policy that supplies NIOC a polestar with which to circumnavigate the plain language of its forum selection clause and thereby avoid its initial, unequivocal and contractually chosen course. The case is thus AFFIRMED and REMANDED for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J85-1064 (L)

NATIONAL IRANIAN OIL COMPANY
PLAINTIFF

V.

ASHLAND OIL, INC.
DEFENDANT

Filed June 27, 1986.

MEMORANDUM OPINION AND ORDER

This cause is before the court on the application of plaintiff National Iranian Oil Company (NIOC) for an appointment of an arbitrator, to compel arbitration and for a stay. Defendant Ashland Oil, Inc. (Ashland) filed timely response in opposition to the application and moved separately to dismiss the application, to compel discovery and for a scheduling order. The court has reviewed the memoranda with attachments submitted by the parties in considering the motions.

This litigation relates to the international sale of Iranian crude oil by NIOC through the 1970's. Beginning in 1973, Ashland's subsidiaries, Ashland Overseas Trading Limited (AOTL) and Ashland Bermuda Limited (ABL), utilized NIOC as the primary supplier of crude oil from the Middle East region under long-term contracts. In the midst of the Islamic revolution in Iran during 1978-79, NIOC on several occasions repudiated, then renegotiated, its contracts with Ashland's subsidiaries. The parties entered a

contract on March 11, 1979 for the sale by NIOC of 150,000 barrels of crude oil per day to AOTL for a two-year, nine-month term. The March contract was repudiated by NIOC on April 10, 1979, and a new form of contract was signed by the parties on April 11, 1979, whereby AOTL would purchase 115,000 barrels per day through December 31, 1979.

Ashland alleges that from April through November 1979, NIOC unilaterally reduced the supply provided for in the April contract from 115,000 barrels per day to 95,000, and also demanded and received higher prices than those agreed upon in the contract. Performance of the contract continued, however, until the seizure of the hostages at the American Embassy in Tehran on November 4, 1979, whereupon NIOC cancelled all further deliveries of crude oil to AOTL. At that time, several cargoes of NIOC crude were en route to AOTL. AOTL received these shipments and has to date refused to make payment for them on two grounds: (1) NIOC, in order to receive payment for these cargoes, was to present certain documents to certain banks pursuant to the terms of documentary letters of credit provided in the contract, which presentation was not made; (2) the money withheld was to cover damages suffered by AOTL as a result of NIOC's breaches of the March and April contracts. The disputed amount totals some $282,000,000.00.

Article X of the April contract provides for arbitration of "any dispute between the parties [defined in the preamble to the contract as NIOC and AOTL] arising out of this contract." Article X also provides that "the seat of arbitration shall be in Tehran." Each party is to appoint an arbitrator under the contract. NIOC instituted the instant action in this court on November 18, 1985, alleging therein that Ashland breached the April contract by failing to make payment. Ashland filed its answer and counterclaim and served interrogatories and a document request upon

NIOC. NIOC's application for appointment of an arbitrator and to compel arbitration followed accordingly.[1]

The Federal Arbitration Act provides that a party to a contract containing an arbitration clause may petition any federal district court "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The district court's power is, however, limited to ordering arbitration proceedings "within the district in which the petition for an order directing such arbitration is filed." *Id.* Alternatively, 9 U.S.C. § 206 allows a district court to enter an order compelling arbitration, in accordance with the agreement, at any place specified in the agreement, provided that such situs is in a foreign jurisdiction which is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention). As stated, the contract at issue here provides for arbitration only in Tehran, Iran. Iran is not a signatory to the Convention. 9 U.S.C. § 201.

NIOC seeks an order compelling arbitration proceedings in Jackson, Mississippi, despite the designation of Tehran, Iran as the arbitration situs in the contract. NIOC finds support for its interpretation of 9 U.S.C. § 4 in recent statements by the United States Supreme Court indicating a strong federal policy favoring arbitration. *See Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238, 1242-43 (1985) ("[t]he preeminent concern of Congress in passing the [Arbitration] Act was to enforce private agreements into which

---

[1] Both NIOC and Ashland have taken the opportunity to exhaustively brief and document their respective positions on whether arbitration is proper in this district, and the court is of the opinion that the parties' requested oral argument would not provide further substantial illumination of the issues. Thus, oral argument is unnecessary. *See Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334, 340 (5th Cir. 1984) (evidentiary hearing on motion to stay pending arbitration not required where no disputed factual issues going to legal question or arbitrability existed).

parties had entered," a concern which "requires that we rigorously enforce agreements to arbitrate."); *Moses H. Cone Memorial Hospital v. Mercury Contruction Corp.*, 460 U.S. 1, 24 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). The court cannot construe this federal policy favoring arbitration as rendering the jurisdictional limitations placed on district courts in 9 U.S.C. § 4 mere nullities. Section 4, and indeed the federal policy favoring arbitration, require strict construction of the arbitration provision of the contract. The court is not empowered by § 4 to rewrite the venue provision of the arbitration clause, or to provide an arbitration situs within this district in the absence of a contractual provision so indicating.

In *Snyder v. Smith*, 736 F.2d 409, 419-20 (7th Cir.), *cert. denied*, 105 S.Ct. 513 (1984), the Seventh Circuit reversed a district court's order compelling arbitration in Illinois in contravention of a forum-selection clause in the contract's arbitration clause designating Texas as the arbitration situs, stating at length,

> [I]f Snyder were to prevail here, any party to an arbitration agreement could avoid the effect of an agreed-to forum merely by filing suit in a different district. This in turn could lead to the parties racing to different courthouses to obtain what each thinks is the most convenient forum for it, in disregard of its contractual obligations. This disregard is not what Congress intended when it enacted a statute to make arbitration agreements enforceable. Thus, the district court in this case had no power under the statute to order arbitration in its district in contravention of the parties' agreement.

Snyder indicates, however, that there may exist in a given case "compelling or countervailing" reasons why forum-selection clause should not be enforced. *Id.* at 417.

See also M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15-19 (1972). NIOC argues that such reasons exist here because Ashland has refused to arbitrate in Iran. Presumably, therefore, the agreement to arbitrate will be effectively rescinded if the NIOC is not allowed to enforce the agreement elsewhere.

The court reads 9 U.S.C. § 4 as strict limitation on its power to enforce arbitration agreements. That power is limited to enforcing arbitration agreements according to their terms and does not include a roving equitable license to accomodate the convenience of the parties by providing a forum for arbitration upon request. As this court is not empowered by the Federal Arbitration Act to compel arbitration of this dispute in this district, Ashland's motion to dismiss NIOC's application for appointment of an arbitrator, to compel arbitration and for a stay should be granted.[2]

Accordingly, it is ordered that plaintiff's application for appointment of an arbitrator, to compel arbitration and for a stay is denied. Defendant's motion to dismiss plaintiff's application is granted. For the reasons stated previously in this opinion, plaintiff's motion for a protective order staying discovery is denied; defendant's motion to compel discovery and for a scheduling order is granted.

ORDERED this 27th day of June, 1986.

TOM S. LEE
UNITED STATES DISTRICT JUDGE.

---

[2] The court will not here address the sufficiency of NIOC's pleadings for purposes of "piercing the corporate veil" or establishing the contractual liability of Ashland on the NIOC-AOTL contract on an "alter ego" theory. Those issues would be proper for consideration on a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. *See North American Plastics v. Inland Shoe Mfg. Co.*, 592 F. Supp. 875 (N.D. Miss. 1984); *McCardle v. Arkansas Log Homes, Inc.*, No. J84-0191(L) (S.D. Miss. Feb. 26, 1986).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-4486

NATIONAL IRANIAN OIL COMPANY,
Plaintiff-Appellant,

versus

ASHLAND OIL, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

---

Filed June 22, 1987

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 05-21-87, 5 Cir., 198___ , ___ F.2d ___)
(June 22, 1987)

Before CLARK, Chief Judge, and GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

(Illegible)

APPENDIX E

CRUDE OIL SALE/PURCHASE

CONTRACT NO. 106

NATIONAL IRANIAN
OIL COMPANY

This Contract made as of 11th day April 1979 between National Iranian Oil Company of Avenue Takhte-Jamshid, Teheran, Iran (hereinafter called "SELLER") of the first part and ASHLAND OVERSEAS TRADING LTD. of Hamilton, Bermuda (hereinafter called "BUYER") of the second part whereby it is agreed as follows:

ARTICLE I—CONTRACT PERIOD

The period for the performance of this Contract shall begin from 1st April 1979 and shall end on 31st December 1979 unless otherwise mutually agreed, about three calendar months before the end of the contract period.

ARTICLE II—QUANTITY/QUALITY

During the Contract Period, subject to the terms and conditions herein set forth, SELLER shall sell and deliver or cause to be delivered to BUYER and BUYER shall purchase and receive from SELLER or from such supplier as SELLER may designate, the following quantity(ies) of crude petroleum (hereinafter called "Oil"), of the quality and grade made available to buyers generally at the loading port concerned. Such quantity(ies) shall be evenly spread over the calendar quarters comprising the Contract Period.

Grade	Quantity	Loading Port
Iranian Light Export Crude Oil	51750 B/D	Kharg Island
Iranian Heavy Export Crude Oil	63250 "	" "

Total	115000 B/D

20 percent of the total quantity mentioned above shall be substituted by one or more of the undernoted grade of offshore crude oils at seller's option.

Rostam	Lavan Island
Sassan	" "
Darius	Kharg Island
Fereidoon	" "
Sirri	Sirri Island
Ardeshir	Kharg Island
Bahrgansar/Nowrooz	Bahrgan Terminal
Cyrus	Cyrus Terminal

ARTICLE III—PRICE

(a) BUYER shall pay to SELLER for the quantity of oil, comprising each shipment the price(s), specified in Paragraph (c) hereunder, F.O.B. Loading Port concerned for each U.S. barrel of 42 U.S. gallons.

(b) The price for each grade of oil shall increase 0.3 U.S. cents per barrel for each 0.1 degree of gravity variation above the indicated minimum gravity, and shall decrease 0.3 U.S. cents per barrel for each 0.1 degree of gravity variation below the indicated maximum gravity.

(c) The price(s), referred to in Paragraphs (a) and (b) above, as effective on the date of this contract, are as follows:

Grade	API Gravity Range	U.S. Dollars Per Barrel
Iranian Light Export Crude Oil	34.00-34.09	16.57
Iranian Heavy Export Crude Oil	31.00-31.09	16.04
Rostam Crude Oil	35.00-35.09	16.46

Sassan Crude Oil	34.00-34.09	16.34
Darius Crude Oil	34.00-34.09	16.31
Fereidoon Crude Oil	31.00-31.09	15.76
Sirri Crude Oil	31.00-31.09	15.81
Ardeshir Crude Oil	27.00-27.09	15.20
Bahrgansar/Nowrooz	25.00-25.09	15.06
Cyrus Crude Oil	19.00-19.09	13.42

The aforesaid price(s) shall be subject to revision and adjustment as determined by NIOC from time to time for application to its term contracts (in contrast to spot sales) of crude oil, the effective date thereof being notified by SELLER to BUYER.

ARTICLE IV—PAYMENT

(a) The payment for each shipment hereunder shall be made by BUYER in U.S. Dollars. BUYER shall, in respect of each shipment to be delivered hereunder establish a duly confirmed, irrevocable, transferable, divisible Letter of Credit in favour of SELLER in the amount of the anticipated value of the shipment. Such Letter of Credit shall be opened through and confirmed by one of the banks designated by SELLER at least 7 days prior to the expected date of arrival of each tanker at the loading port and will be duly notified to SELLER by the confirming bank.

(b) Payment against such a Letter of Credit shall be made within 60 days from the date of the Bill of Lading of the shipment concerned upon the presentation by SELLER of the following documents:

(i) SELLER's invoice;

(ii) Full set (original, duplicate, triplicate Bills of Lading made out to the order of SELLER blank endorsed, and signed by the Master of Vessel;

(iii) Certificate of Quantity/Quality as provided hereinafter;

(c) SELLER may refuse delivery of cargo and defer carring out any of its obligations under the Contract until payment, as stipulated herein, is received in a manner acceptable to SELLER.

(d) BUYER shall be liable to pay interest, at a rate to be notified by SELLER, if the above payment is not effected within the 60 days period as stated above.

(e) The text of the Letter of Credit mentioned in Paragraph (a) above, shall conform to the format given in Annex "A" hereof.

ARTICLE V—DELIVERY

(a) SELLER undertakes to deliver and BUYER undertakes to receive the quantity deliverable under this Contract in full or part cargo lots by vessels nominated for this purpose.

(b) BUYER will receive the oil in bulk to tanker(s) to be provided by BUYER at the loading terminal, in the Persian Gulf, designated by SELLER.

(c) Delivery shall be deemed completed and title shall pass as the oil passes the flange connecting SELLER's or Supplier's pipeline or delivery hose with vessel's intake pipe, at which point SELLER's and Supplier's responsibilities shall cease and BUYER shall assume all risks of loss, damage, deterioration or shrinkage as to the oil so delivered.

(d) Any loss of or damage to the oil, or to any property of SELLER or Supplier or of any other person, during berthing, loading and unberthing, caused by vessel's fault shall be borne by BUYER.

(e) The vessel shall load at any safe place or wharf, reachable on her arrival, which shall be designated and pro-

vided by SELLER or its Supplier, provided that the vessel can proceed thereto, lie at and depart therefrom always safely afloat. Each vessel shall comply with all applicable Government and SELLER's or Supplier's regulations at any time in force at the loading port, including those relative to fire.

(f) All loading and docking procedures shall be subject to the Port regulations of the loading terminals (Conditions of Use of the Oil Terminal) as may be in force from time to time.

(g) BUYER undertakes to nominate vessels during the quarterly period on a reasonably even basis. BUYER shall notify SELLER 60 days before the commencement of each calendar quarter the quantity of the oil, grade by grade, to be lifted during each month of the said quarter. Such programme of liftings shall be deemed acceptable to SELLER but if not acceptable, SELLER shall notify BUYER within 10 days of the receipt thereof and the two parties shall agree on a mutually acceptable programme not later than 40 days before the commencement of the subsequent calendar quarter.

(h)1 BUYER shall furnish to SELLER nominations of vessels for its liftings by the latest 10th of each month for the subsequent month. Such nominations shall be deemed acceptable to SELLER unless SELLER notifies BUYER by cable or telex to the contrary latest by 20th. In such event, the parties shall mutually agree to arrange for an acceptable date or to arrange for another vessel to be nominated for loading. Such nominations may include "To be notified" (TBN).

(h)2 Nominations referred to in (h)1 above, shall include name of vessel, the quantity by grade of the oil to be loaded and a five day range of the expected date of arrival.

(h)3 Not less than ten days before the arrival of the vessel, BUYER shall inform SELLER about the final date of arrival of the vessel and give written instructions regarding the vessel, the making up and disposition of the Bill of Lading and the order for port(s) of loading and discharge.

(h)4 BUYER, after having nominated a vessel under paragraph (h)1 hereof may substitute another vessel of similar type and size, provided SELLER is notified by cable at least five days before the arrival of vessel at loading port. The scheduled date of arrival of any vessel thus substituted and the quantity of oil to be lifted thereby shall not, without the consent of the SELLER or Supplier, differ from the last accepted scheduled date and quantity concerning the vessel for which the substitution is made.

(i)1 BUYER shall arrange for vessel to report by radio in SELLER or its Supplier at loading port seven days in advance of and again seventy two hours and 24 hours prior to arrival at such port, stating expected date, and time of arrival. If vessel's last port of call is less than seven days steaming time from the loading port, vessel shall report to SELLER or its Supplier, as aforesaid, promptly after departure from its last port of call.

(i)2 Loading shall be subject to vessel's arriving on the latest estimated time of arrival, the availability of berth and of the oil (in case the vessel arrives soon after the days when the loading port has been closed due to Force Majeure), and the observance of the principal of "First-Come-First-Served" in accordance with the custom and practice of loading port. SELLER or its Supplier shall not be obligated to load the vessel at any time if it arrives more than 12 hours after the above time unless SELLER notifies BUYER of its willingness to do so.

(i)3 If a vessel arrives within 12 hours before or after the latest accepted estimated time of arrival, as provided in Paragraph (i)1 hereof and tenders the notice of readiness to receive cargo, the vessel shall await its proper turn and loading time shall not commence until loading commences.

(i)4 The period of time allowed within which to complete the loading of vessel(s) shall be increased by any amount of time consumed due to:

(i) The breakdown of terminal loading equipment or inability of the vessel's facilities to receive the cargo within the time allowed.

(ii) Delay to the vessel(s) reaching her berth, caused by conditions not reasonably within SELLER's or Supplier's control;

(iii) Friday or holiday or regulations of BUYER owner or operators of the vessel(s) or State Port Authority which prohibit loading at any time;

(iv) Delays caused by weather or by force majeure;

(v) Discharging ballast or slops; and

(vi) Vessel's awaiting customs and immigration clearance

(i)5 SELLER or its Supplier shall be allowed sufficient time to complete the loading at the pumping rate customary at the loading port concerned, weather permitting or, at whatever lesser rate deemed necessary, if vessel's facilities are capable of receiving cargo at the specified rate.

(i)6 Loading shall be deemed completed when hoses have been disconnected.

(j) Vessel(s) shall vacate berth as soon as loading is completed. Any actual loss or damage incurred by SELLER or its Supplier as a result of vessel's failure promptly

to vacate berth, including such as may be incurred due to resulting delay, the docking of other vessels awaiting turn to load, shall paid by BUYER to SELLER.

(k) Should BUYER find that the principle of First-Come-First-Served, as customary and practiced at the loading port, has been violated BUYER or Master of the vessel shall lodge a protest with SELLER within 48 hours of the incident, SELLER shall have this protest investigated and verified by the authorities of the loading port and, if confirmed by the said authorities, SELLER shall pay to BUYER subject to the provisions of Paragraphs (f), (i)2, (i)4 and (i)5 hereof, the demurrage for the time lost due to such incident, equal to the time certified by the authorities of the loading port. The demurrage shall be calculated as follows:

1- At the AFRA rate applicable to vessel of the type, size and speed used by BUYER to move such oil in similar trade under market conditions prevailing on the date SELLER received notice of the name of such vessel from BUYER, pursuant to Paragraph (h)1 hereof.

2- Where the vessel being loaded is under charter the demurrage shall be paid at the rate provided for in the charter party of the vessel or the demurrage expenses actually incurred by BUYER whichever is less.

(1) BUYER shall, at all times, be responsible for the observance and performance of any provisions, requirement or obligations herein prescribed with respect to the vessels nominated by BUYER hereunder.

(m) BUYER shall give preferential consideration, on reasonable conditions, to transportation of crude oil on Iranian owned tankers and/or tankers operating under Iranian flag.

ARTICLE VI—CERTIFICATION AND DOCUMENTATION

(a) The quantity of each cargo delivered to BUYER's vessel shall be determined by shore measurements carried out by SELLER at the loading port in the manner customary in that port. Correction for variation in temperature shall be made in accordance with the ASTM-IP

(b) Provisions shall be made for the taking of representative samples of the crude oil delivered to a vessel. Such sample shall be retained for 90 days after the loading of the vessel. SELLER will deliver to the vessel concerned a sealed line sample under receipt of the Maste if so requested by BUYER in writing or by telex at least five days before the arrival of the vessel.

(c) An independent inspector appointed by BUYER (at BUYER's cost) may witness measurement of quantity/quality of the oil delivered to a vessel.

(d) SELLER shall provide BUYER with certificate of quantity and quality issued at the loading port by the Supplier concerned, and shall cable advice of quantity loaded and the sailing date of the vessel to BUYER, within 48 hours after the completion of loading of vessel. The quantity and quality specified in the respective certificates shall be the Invoice and Bill of Lading quantity and quality. Such certificates shall be accepted by both parties as binding and conclusive.

(e) Unless otherwise notified by BUYER, documents for each shipment shall be issued and distributed by SELLER as per Annexe (C) hereof. Should BUYER require any changes to be made in the preparation of copies or distribution of the documentation listed in the said Annexe (C), BUYER shall notify same to SELLER at least 10 days before the arrival of the vessel for which the change is required.

ARTICLE VII—CHARGES AND DUES

It is understood that the oil supplied hereunder shall not be subject in Iran to any taxation, fee or charge of any nature or licence fee. BUYER and/or agents of the vessels nominated hereunder shall, however, be liable for payment of the port dues as well as all charges in respect of the services utilized by the vessel at the Iranian loading ports. SELLER shall in no case, be responsible for payment of any taxes, levies or charges arising outside of Iran.

ARTICLE VIII—FORCE MAJEURE

a) Any failure by a party to comply with the terms of this Contract which is attributable solely to force majeure shall not be regarded as a failure to perform its obligations. For the purpose of this Article Force Majeure shall mean any event beyond the reasonable control of a Party and shall include (but not be limited to) war, civil commotion, strike, storm, tidal wave, flood, epidemic, explosion, fire, lightning or earthquake.

b) If due to causes beyond the control of SELLER or Supplier their ability to deliver the oil at the loading port concerned is diminished, SELLER shall be entitled to suspend or reduce deliveries at SELLER's discretion and such suspension or reduction shall not give rise to any claim by BUYER.

ARTICLE IX—PERFORMANCE BOND

BUYER shall, within 15 days of the execution of this Contract or 10 days before the nomination of the first vessel, whichever is the earlier, furnish SELLER with a guarantee of performance equivalent to 5% of the anticipated total value of the oil herein agreed to or the value of one of the maximum anticipated shipments of the oil, whichever is more, in the terms set out in Annex "B"

hereto, issued by a reputable bank, accept to SELLER. If the said guarantee is not received by SELLER, as stated above and in a manner satisfactory to SELLER, SELLER may terminate the Contract without prejudice to its rights and dues hereunder.

ARTICLE X—ARBITRATION

Any dispute between the parties arising out of this Contract shall be settled by arbitration.

The party who wants to submit such a dispute to arbitration shall advise the other party in writing, stating therein its client and nominating its arbitrator. The other party shall nominate a second arbitrator within 30 days after receiving the said advice.

The two arbitrators thus appointed shall appoint a third arbitrator who shall be the president of the board of arbitration. Should the other Party fail to appoint and nominate the second arbitrator or should the two arbitrators fail to agree on the appointment of the third arbitrator within 30 days, the interested party may request the President of the Appeal Court of Tehran, Iran to appoint the second arbitrator or the third arbitrator as the case may be.

The arbitrators appointed as per above provisions shall have broad experience with respect to the petroleum industry practices and oil marketing and be reasonably fluent in written and spoken English.

The arbitration award may be issued by majority and shall be binding on both parties.

The award shall be goverened by and interpreted according to the laws of Iran.

The seat of arbitration shall be in Tehran, unless otherwise agreed by the parties.

ARTICLE XI—ASSIGNMENT

This Contract shall not be assigned by either party without the written consent of the other party.

ARTICLE XII—GOVERNING LAW

The Contract shall be governed by and construed according to the laws of Iran.

ARTICLE XIII—NOTICES

Any notice or communication required hereunder shall be in writing and deemed to have been served, if received at the expiration of the time normally required to make delivery by registered mail or by prepaid telegraph, cable or telex or radio to the following addresses or at such other addresses as the Parties may from time to time by written notice designate for this purpose:-

BY SELLER to BUYER at the office of Ashland Overseas Trading Ltd. 58. St. James's Street, Lond, SWIA IPR England Telex 261786 Cable : ASHLANDOIL LONDON.

BY BUYER TO SELLER at the office of National Iranian Oil Company (Marketing & Exports) Avenue Takhte-Jamshid P.O. Box 1863, Tehran (Iran) Cable "NAFTMELLI" Telex 212514 Tehran.

ARTICLE XIV—RESALE

BUYER undertakes not to sell or cause to be sold in Iran whether for refining, consumption or otherwise part or whole of the consignments delivered to BUYER and intended for export.

ARTICLE XV—DESTINATION

(a) BUYER undertakes that the oil lifted by BUYER hereunder shall not be brought into such territories as may

from time to time, be restricted for this purpose by the Governor of Iran. On the date of the signature of this Contract, such restriction applies to Israel. Republic of South Africa and Rhodesia.

(b) Any infringement of the provisions of this Article shall disqualify BUYER from receiving further shipments under this Contract and from future transactions with SELLER.

ARTICLE XVI—BUNKER

BUYER undertakes to bunker its vessels nominated for lifting the oil under this contract at such loading terminals where SELLER may make bunkering facilities available. The aggregate quantity of bunker to be so lifted by buyer during a calendar quarter shall not be less than 2.8 percent PRO RATA the volume of crude oil stipulated under Article II hereof. Price of such bunker shall be the applicable posted price of NIOC effective on the date of delivery and other terms and conditions shall be as per NIOC standard contract for sales of bunkers.

ARTICLE XVII—CONFIDENTIALITY

Both parties to this Contract undertake to treat the contents of this Contract as strictly confidential.

IN WITNESS WHEREOF, THE PARTIES HERETO HAVE CAUSED THIS CONTRACT TO BE SIGNED BY THEIR DULY AUTHORIZED REPRESENTATIVES THE DAY AND YEAR FIRST ABOVE WRITTEN.

NATIONAL IRANIAN OIL COMPANY	ASHLAND OVERSEAS TRADING LTD.
AUTHORIZED REPRESENTATIVE	AUTHORIZED REPRESENTATIVE

ANNEX "A"

FORM OF LETTER OF CREDIT

..... BANK

Doc. Credit No. _____
The National Iranian Oil Co.
"Marketing & Exports"
P.O. Box 1863
Ave. Takhte Jamshid
TEHRAN/IRAN

We hereby open an Irrevocable/Transferable Documentary credit in your favour for an amount of U.S. Dollars 5% more or less, available by us. Said credit shall be payable to you within days for the date of the relevant Bill of Lading on the presentation of the following documents.

Commercial Invoice

Bill of Lading

Certificate of quantity & quality

evidencing shipment between _____and ____ _____by tankship "_____" or substitute from-_____ terminal to _____ of _____Tons _____ _____ _____% more or less, per barrel for crude of to _____API gravity at 60°F. This price will increase by U.S.$ 0.003 for each 0.1 degree of gravity above the indicated minimum gravity and will decrease by U.S.$ 0.003 for each 0.1 degree of gravity below the indicated maximum gravity.

[1] This credit is valid until _____for presentation of documents to _____.

ANNEX "B"

FORM OF PERFORMANCE BOND

..... BANK

The National Iranian Oil Company.
P.O. Box 1863

Tehran.

Attention: Marketing & Exports

Gentlemen,

In reference to the Agreement made between you and Messrs _____(hereinafter called BUYER) on the _____of _____19 ____ for the purchase and sale of _____ U.S. barrels of Crude Oil we hereby guarantee that in the event of the said BUYER committing a breach of the said Agreement, we shall assume all liabilities under the above contract provided that the total extent of these liabilities shall be deemed satisfied by our paying to you a sum equal to _ _____% of the value of that part of the contract which is unfulfilled by the BUYER as of the date when the breach occurs. In any event, our maximum liability under this bond shall under no circumstances exceed _____ .

A written statement by you notifying us of a breach of the terms of the said Agreement by the Buyer shall, constitute sufficient proof that such breach has in effect taken place.

Any notice to be addressed to us hereunder shall be deemed to be sufficiently served if despatched by prepaid registered air mail or by cable to _____

_____ .

This bond, as stipulated above, expires the latest on ____.

Very truly yours,

ANNEX "C"

DOCUMENTATION SCHEDULE

DOCUMENTS	MASTER OF VESSEL	CONSIG-NEE (1)	CONSIG-NEE (2)
BILL OF LADING	1		
CERTIFICATE OF QUANTITY/ QUALITY	1		
TIME SHEET	1		
CERTIFICATE OF ORIGIN	1		
SAMPLE RECEIPT	1		

NOTE: ONLY COPIES OF THE ABOVE MENTIONED DOCUMENTS WILL BE FURNISHED.

APPENDIX F

In the Supreme Court of Bermuda

CIVIL JURISDICTION 1985 No. 326

BETWEEN: NATIONAL IRANIAN OIL COMPANY
(a company organised according to the laws
of the Islamic Republic of Iran)

-and-

ASHLAND OVERSEAS TRADING LIMITED

-and-

ASHLAND OIL INC.

Mr. Pollock Q.C. and Mr. Bell for the Plaintiff
Mr. Crystal Q.C. and Mr. Hargun for the Defendants

JUDGMENT

COLLETT, J.

By its summons dated 30th September, 1986 the First Defendant Ashland Overseas Trading Limited (AOTL) seeks an order of this Court in the exercise of its inherent jurisdiction to stay this action brought against it by the Plaintiff National Iranian Oil Company (NIOC) on a number of grounds there specified. A further summons taken out by the First Defendant Ashland Oil Inc. (AOI) was disposed of at the hearing by way of a consent order made in terms of paragraph (a) of its summons dated 5th November 1986, whereby the original order giving leave for service of the Notice of the Writ upon it out of the jurisdiction of this Court was set aside together with the consequent service. It follows that the order now applied

for by AOTL will, if granted, have the effect of staying these proceedings altogether and indefinitely.

AOTL, a Bermuda incorporated exempted company trading in petroleum and petroleum products, is to all intents and purposes a wholly owned subsidiary of AOI, a corporation domiciled In Kentucky, U.S.A., which is a very substantial business entity also trading in such products and is the owner and operator of a large petroleum refinery in that state. NIOC is a corporation formed and existing under the laws of Iran, wholly owned by the Islamic Republic or Iran and charged, inter alia, with the exercise of the ownership right of the Iranian nation in the oil resources of that country and with operation of its oil and petrochemical industries.

Commercial relations between NIOC and the Ashland group ante date the Iranian revolution by some five years and NIOC became an important supplier in particular of light Iranian crude oil for the AOI refinery. The events of late 1978 and early 1979, which culminated in the deposition of the Shah and return of the Ayatollah Khomeni, interupted these relations which were then governed by two long term contracts: force majeur provisions were invoked by NIOC under Article VIII of both contracts on 1st November 1978. As a result of the revolution shortages of crude oil drove prices higher and Ashland was obliged to purchase in the spot oil market in order to keep its refinery active.

Negotiations were resumed between the parties early in 1979 with a view to restoring a long term commercial relationship. In March a meeting took place in Tehran attended by senior executives of both AOI and AOTL which resulted (inter alia) in the signing of a document dated 11th March 1979 entitled 'Heads of Agreement' and purporting to regulate supplies during the period 1st April 1979 to 31st December 1981. It was concluded between NIOC represented by its General Manager Marketing for

Export, Mr. Reza Azimi and 'Ashland' represented by Mr. John Hall, Executive Vice-President of AOI and by Mr. Dougan the Manager of its London office. This was followed by an exchange of telex and by correspondence indicating a firm agreed intention for the parties to meet again for the purpose of drawing up a final contract. In the meantime in addition to the delivery of a spot cargo of oil which had been contracted for between the parties at the 11th March meeting in Tehran, another cargo was delivered in accordance with the terms of that Heads of Agreement, early in April 1979.

The legal effect, if any, of this document is and has been a matter of considerable contention between the parties. That is not a matter which can be resolved upon affidavit evidence at this stage: it is an issue for decision at a trial. Another such issue arises in connection with a formal contract which was drawn up and executed at a subsequent meeting in Tehran on 11th April 1979 together with a side letter bearing that same date. The formal contract is expressed to be entered into between NIOC and AOTL and to regulate supplies during the period 1st April 1979 to 31st December 1979 only. It specifies smaller quantities of oil and a smaller percentage of the more desired light crude than the 3rd March 1979 Heads of Agreement, which the contemporaneous side letter stated should cease to be of effect as from 11th April 1979. AOI and AOTL have claimed that not only was the 11th March 1979 Heads of Agreement a valid and binding contract in itself but that it was unilaterally repudiated by NIOC at the April meeting, when as a result of economic duress the Ashland representatives were compelled to execute the side letter and to enter into the 11th April 1979 contract willy nilly so as to avoid a total dislocation of necessary oil supplies. These contentions are vigorously denied by NIOC who maintain that both the formal contract and the side letter were [incomplete in original].

Upon the basis that commercial relations between the parties were governed by the April contract up until 15th November 1979 further allegations are made against NIOC of short deliveries, excessive price increases and other unilateral non-observances of the contractual terms, all of which NIOC has denied. In November 1979, however, commercial relationships between the parties came to a further halt following the notorious hostage crisis which erupted with the storming of the U.S. embassy in Tehran on 4th November 1979. On 12th November 1979 the Iranian government prohibited further export of oil to the U.S.A. and on the same date President Carter issued a proclamation prohibiting the import of Iranian oil into that country. On November 1979 NIOC sent a telex notifying Ashland that "in view of recent events we are not in a position to continue delivery of oil to you". No further deliveries have been made since then.

As of that date a number of cargos of oil which had been delivered f.o.b. nominated ships at Iranian ports by NIOC both under the April long-term contract and under spot contracts with AOTL were unpaid for. The standard procedures for payment stipulated for by NIOC and incorporated into the April contract had called for the opening by AOTL of confirmed letters of credit for the agreed price of each such consignment with banks in New York city which could be drawn upon by NIOC upon presentation of specified documents relating to that consignment. A failure to present the correct documents within the contractual time limit led to the lapsing of the relevant letters of credit which had been duly established in respect of these consignments. That did not, of course, absolve the purchaser from its obligation to pay the price but it did prevent NIOC from recovering this from the Banks and obliged it instead to apply direct to Ashland for payment. The amount outstanding has been calculated at a total of U.S.$282,881,712.40 and this amount together with accrued interest is the basis of NIOC's claim in the present

action as well as in other proceedings which it has brought against AOI in the U.S. Federal District Court for the Southern District of Mississippi.

Neither AOI and AOTL have disputed the amount or the substance of that claim but they have asserted that by reason of the allegations which have been already referred to arising out of the 11th March 1979 Heads of Agreement, the 11th April 1979 long term supply contract and related matters, they have a counterclaim sounding in damages which considerably exceeds the NIOC liquidated claims and which they are entitled to set off against the latter in extinguishment thereof. That contention was first advanced in a letter of 20th February 1980 which has been referred to at the hearing as "the set-off letter". A considerable volume of litigation has ensued worldwide which must now be briefly reviewed before the issued are addressed in turn.

On 13th November 1980 AOTL filed suit in the U.S. District court for the Southern District of New York against NIOC claiming damages for alleged wrongful acts in connection with the 11th March 1979 Heads of Agreement and the 11th April 1979 long term contract. There is a dispute between the parties as to whether or not these proceeding were properly served upon NIOC, which does not require a resolution by this Court. It is common ground that, before NIOC was required to respond, the New York proceedings were suspended as a result of the promulgation of the Algiers Accords between the U.S.A. and Iran on 9th January 1981 and the issuance on 24th February 1981 of executive order 12294 by President Reagan to give effect to those Accords. That suit although still extant has remained in limbo ever since, although it appears likely that it could now be revived if all the parties could agree to co-operate in its revival.

The Algiers Accords established an International Arbitral Tribunal at the Hague, composed of equal number of

U.S., Iranian and neutral adjudicators, for the purpose of their hearing and resolving claims by nationals of the U.S.A. against Iran and by nationals of Iran against the U.S.A. as well as between the two governments themselves. These Accords did not invest the Tribunal with jurisdiction to resolve claims made by either government against the nationals of the other. Definitions contained in the Accords identify agencies and instrumentalities of Iran as the state itself and it follows that NIOC as such an agency or instrumentality could not employ the machinery of the Accords to advance its claim against AOI, a U.S. national within those definitions, at the Hague Tribunal. The converse however is not also true. AOI could have asserted its claims against NIOC at the Hague.

It has been suggested that because those claims were claims that AOI were asserting in the name of AOTL, which is not a national of the United States by definition, it could not have done so; but this argument has been refuted by the repeated decisions of all three of the constituent panels of the Tribunal, which have upheld the right of United States corporate nationals to bring claims before the Tribunal although asserted through a non-United States subsidiary. Although a final decision on the legality of that procedure is still now pending before the full Tribunal, the existence of these provisional decisions bearing in mind the makeup of the panels must be regarded as putting the question beyond any realistic doubt for present purposes.

AOI did not choose to assert its claims before the Hague Tribunal. That choice is not one which in my judgment can give rise to any legitimate criticism. On the other hand it must weaken the force of any contention on its part of that of AOTL that is based upon the alleged unfairness of NIOC's reliance upon the operation of time-bar limitations in other jurisdictions in respect of the claims which AOI chose not to assert within the twelve month time limit set out in the Algiers Accords.

Before leaving the Hague Tribunal, note should be taken of some pending proceedings there in which the Iranian government has laid claims against the U.S. Government based upon an alleged failure to ensure payment by AOI of the NIOC claims. It has been suggested the existence of these proceedings and the possibility of an eventual decision adverse to the U.S. government might give rise to possible double jeopardy in Bermuda on the part of AOTL. I am satisfied this cannot be the case, however, since any payment by the U.S. Government following such an award would pro tanto extinguish NIOC's claim in Bermuda in the present action leaving the U.S. Government to persue such remedies over as it might be advised, in all probability against AOI rather than AOTL. The point is therefore moot and does not affect the exercise of the Courts descretion in the present application.

The 11th April, 1979 long term contract contained an arbitration clause providing for settlement of disputes arising thereout by three arbitrators, one each selected by the parties and the third by the two so selected or failing this by the President of the Appeals Court of Tehran. The situs of the arbitration was stated to be Tehran unless otherwise agreed and the arbitrators were to be persons having broad experience with regard to petroleum industry practices and oil marketing.

NIOC on 17th November, 1983 sought to invoke this clause so as to launch an arbitration in Tehran and an exchange of telex ensued in the course of which AOTL refused upon a number of stated grounds. NIOC sought to persist by nominating its arbitrator and by applying to an Iranian court to appoint an arbitrator for AOTL in default. This move foundered upon procedural difficulties and no further moves were made thereafter. Iran is not a signatory to the International Convention on the Enforcement of Arbitral Awards: it follows that neither AOI or AOTL are amenable to the jurisdiction of Tehran arbitrators appointed without their consent and to all prac-

tical intents this particular arbitration must be regarded as defunct.

On 11th September, 1985 NIOC commenced the present proceedings in Bermuda by issuing a generally endorsed writ against AOTL. On 12th May, 1985 the writ was amended by leave to join AOI and to restate the causes of action with a greater particularity. On 18th November, 1985 NOIC commenced the proceedings already referred to in Mississippi against AOI. It seems clear that the Bermuda proceedings were initially begun when they were for the purpose of preserving NIOC's right of action within this jurisdiction against the imminent danger of a time bar arising under the Limitation Act 1782 six years after the relevant cause of action had arisen. It is equally clear that this was also one of the purposes of the Mississippi proceedings: that state is one of a handful in the U.S.A. which like Bermuda enjoins a six year general limitation period in civil actions. It was a state in which AOI was registered to do business and in which therefore personal jurisdiction against it could be well-founded. By suing in the Mississippi District Court advantage could also be taken of the Federal procedure whereby a plaintiff can ask the court for a compulsory reference of a case to arbitration based on an applicable arbitration clause in the relevant contract; a procedure which is not, of course, open to a plaintiff in this Court or in the English court. NIOC's complaint in Mississippi is evidently founded on the premise that although it contracted with AOTL and not AOI the latter completely dominated, managed and controlled the former so that the court would be justified in piercing the corporate veil and holding it liable on AOTL's contracts with NIOC. Having set out its claims for the price of goods sold and delivered and in the alternative for breach of contract or unjust enrichment, NIOC proceeded in its complaint to request an order for compulsory arbitration from the District Court.

Nothing further was done in the Bermuda proceedings until 27th August, 1986 when application was made for leave to serve AOI out of the jurisdiction and shortly thereafter AOTL was served within the jurisdiction. These steps followed an exchange of correspondence between the parties' Bermudian attorneys from which it became apparant that the writ would expire unless service could be effected and that no procedural agreement to prevent that occurrence could be reached. At that point of time therefore the primary purpose of these proceedings would still seem to have been protective.

It is evident and I accept as a fact that NIOC has consistently throughout sought to obtain a private arbitration of its claims in whatever situs might be available for that purpose either with the agreement of AOI/AOTL, which has not been forthcoming, or by compulsory process. Its efforts to achieve this end have not been compiciously successful thus far. AOI responded to the Mississippi complaint by filing an Answer and Counterclaim, based on the allegations already mentioned and has demanded a trial by jury of the issues thus raised - a Constitutional right which the District court will seemingly not have a discretion to refuse. NIOC's application to that court for compulsory arbitration was denied on the ground that, since the arbitration clause in the contract specified Tehran as the situs, the Court lacked the necessary jurisdiction to compel an arbitration in the U.S.A. An appeal by NIOC to the Fifth Circuit Court of Appeals has also been refused and, although there is currently a petition pending in that court for re-hearing and the possibility of a further application to the U.S. Supreme Court if that fails, the likelihood must be at the present time that NIOC will not achieve its ends of securing binding arbitration of the issues between itself and AOI. The consequence of this must be that the Mississippi proceedings will certainly continue in the District court.

Even in the unlikely event of a reversal of the Fifth Circuit Court of Appeals decision or of it being overruled in the U.S. Supreme Court, it is by no means certain that all of the issues raised by the AOI counterclaim are susceptable of reference to arbitration under the relevant clause in the 11th April 1979 contract. Some in any event may fail to be litigated in the Mississippi court. This Court is not in a position, even if it had been approached for that purpose, to injunct AOI from persuing its counterclaim in Mississippi since AOI is not now subject to the jurisdiction of this Court. The overwhelming probability is thus that this Mississippi litigation will proceed.

I therefore approach the procedural issues in this case well aware that only two alternatives are open in the circumstances. Either the Bermudian proceedings must be stayed so that the District Court in Mississippi becomes the sole forum for disposal of the substantive issues raised on either side or else two parallel sets of proceedings must continue on simultaneously between the same plaintiff but different although closely related defendants, in which substantially the same issues on either side will fail to be litigated under two different sets of procedure and with the possibility of inconsistent results.

The first submission relied upon by Mr. Crystal for the Defendants in support of the application to stay was that NIOC is using the Bermuda proceedings improperly for a collateral purpose, namely to extract from Ashland an agreement to arbitrate the issues rather than to litigate. He points to a NIOC offer to agree to a stay but only in return for an agreement on Ashlands part to arbitrate. Mr. Pollock for the Plaintiff frankly admits and indeed asserts NIOC's long-standing preference for arbitration which he submits is the ideal method for resolution of all the disputed issues on the merits, especially if the arbitrators were to be persons experience in the field of oil production and trading as the 11th April 1979 contract provides. He points out that NIOC has offered to waive

all technical objections such as time-bars and to accept any venue acceptable to Ashland if any agreement to arbitrate could be reached. He explains his client's reluctance to litigate in the U.S. Courts as resting on a perception that any U.S. jury will have an in-built bias against them and that the U.S. system of wide ranging discovery will afford a maximum opportunity to their opponents to exploit it.

It is of course apparant that if this attitude can properly be stigmatised as a collateral purpose in the sense of that term as used by Mr. Crystal, this Court would have no hesitation in staying the proceedings as vexatious and an abuse of process, quite apart from any consideration of the doctrines of forum non conveniens or lis alibi pendens. Mr. Crystal relied in this connection upon *Speed Seal Products Ltd. v. Paddington (1985) 1 W.L.R. 1327* and upon *Re Bellador Silk Ltd. (1965) 1 A.E.R. 667* in support of his proposition. The essential facts of those two cases bear no relation to those of the instant case, however and, in particular in both of them it became apparant at the hearing that the plaintiff or petitioner had from the outset harboured an indirect purpose which he was seeking to achieve by misuse of the courts machinery. Here by contrast the initial purpose, to protect against a time-bar, is as quite legitimate. The more active pursuit of these Bermuda proceedings by NIOC since its hopes of compelling arbitration through the Mississippi court have faded also seems legitimate. While an arbitration remains NIOC's preferred option for disposal of the substantive issues, litigation in Bermuda is quite clearly now preferred on its part as a 'second best' to litigation in the U.S.A. That comes nowhere near an abuse of process and accordingly it does not supply the necessary basis to found the judicial exercise of this Courts discretion to stay.

A further ground relied upon by Mr. Crystal was that a trial of the issues of substance between the parties here is likely to involve this Court in the investigation and the resolution of issues which are non justiciable, namely ques-

tions as to what the Government of Iran should or should not have done in its sovereign capacity within Iran during November/December 1979 and whether or not its acts or ommissions caused the Presidential proclamation prohibiting oil imports into the U.S.A. The arguement upon which this submission is based is necessarily tortuous: it proceeds as follows. Ashland contends that NIOC's action in cutting off oil supplies on 15th November 1979 was a breach of the 11th April 1979 long term agreement and/or of the 11th March 1979 Heads of Agreement. NIOC admittedly will seek to plead force majeur and/or frustration as justification for its actions. Ashland will seek to counter (1) by identifying NIOC so closely with the Iranian government that it cannot rely on the acts of the latter as an independant operating cause; and (2) by seeking to show that the interruption of oil supplies was precipitated by Iranian government responsibility for and/or condonation of the siezure of the U.S. Embassy and hostages in breach of International law. It is the second of these propositions which counsel points to as giving rise to non-justiciable issues central to the case.

In support Mr. Crystal relied upon *Buttes Gas v. Hammer (1982) A.C. 888* and in particular upon the formulation by Lord Wilberforce in his leading speech of a general principle of judicial restraint, that the courts will not adjudicate upon the transactions of foreign sovereign states. At page 932 of the report Lord Wilberforce quotes from Lord Cottenham L.C. in Duke of Brunswick v. King of Hanover, where the latter stated the question as being, whether the courts of this country can sit in judgment upon the act of of sovereign effected by virtue of his sovereign authority abroad and concluded that they could not inquire into it. He also quoted from the speech of Lord Campbell, that a question as to the validity of an act of sovereignty arose in that case, and concluded that it gave support for a principle of non-justiciability by the English courts of a certain class of sovereign acts. The issues

arising in the Buttes Gas action were such that, as the House of Lords concluded, they would inevitably involve the English courts in adjudicating upon the validity of the acts of a foreign sovereign and upon the motives underlying those acts on its part, so as to arrive at a determination of the issues central to the defendants counterclaim in that action.

It by no means seems so clear that the issues likely to arise at a trial of the present proceedings would necessarily involve an investigation by this Court of the validity or of the motives for the actions or omissions of the Government of Iran in November, 1979 or of the contemporaneous actions of the U.S. President. What seems involved is rather an investigation of the facts and the chronology and of inter-action of the various events of that eventful month with a view to determining whether or not on a balance of probabilities it can be concluded that a chain of causation stretches from the acts of the Iranian Government to the interruption of oil supplies which occurred. That by itself does not involve passing upon either the validity in international law nor upon the morality of those acts or of the acts of the U.S. Government in turn. I very much doubt therefore whether upon this analysis any non-justiciable issues are likely to arise at trial to prevent the doing of justice between the parties.

Moreover, before counsel can rely upon this doctrine at all for present purposes it is necessary for him to show that NIOC was at the relevant time so closely identified as an arm of the Iranian Government that it cannot take advantage of the acts of the latter as constituting force majeur or commercial frustration. *C. Czarnikow Ltd. v. Rolimpex (1979) A.C. 351* is authority for the proposition that a state owned and state controlled enterprise is not by reason of those factors alone deprived of the right to rely upon the acts of the relevant state government as constituting force majeur or such a frustration. It is true that in that case the relevant primary and conclusory fac-

tors had been found and stated in detail by an award of arbitrators, while the factual situation in the instant case is by no means so clear at this stage. The evidence here such as it is shows that before the Iranian revolution NIOC enjoyed an autonomous corporate status broadly similar in scope to that of Rolimpex, whereas subsequently by post-revolutionary legislation it has become much more closely identified with the Ministry of Petroleum of the Iranian government as an affiliate or sub-division thereof. However, a close reading of the available English translations from the Farsi of this legislation leads me to conclude (1) that in all liklihood that change in status did not take effect until June, 1980 at the earliest and (2) accordingly, the operation of the force majeor clause of the 11th April, 1979 contract and/or the operation of the doctrine of commercial frustration of contract in November, 1979 is unlikely to have been prevented. While these are at best provisional conclusions on the facts they serve to reduce still further the realistic possibility of any substantial non-justiciable issue blocking the path of the Court towards doing justice between the parties at a trial in Bermuda.

Another factor affecting this question of non-justiciability is the scope which, in any event, it may have for preventing a fair trial of the substantive issues. As Mr. Pollock points out, it is only a part of the Ashland cross-claims for damages which might be affected by this question and moreover, the ability of AOTL to plead these cross claims at all as a set-off extinguishing or reducing NIOC's claims against AOTL for the price of goods sold and delivered has been called in question. If they cannot be relied upon as an equitable set-off and thus as a defence but only as counterclaims, the fact that some non-justiciable issues might be raised thereby would not justify this Court in preventing NIOC from persuing its claims for the price which arise no such non-justiciable issues in themselves.

Mr. Pollock submits that the cross-claims do not go to impeach the title of the Plaintiff to its claims for the price, since they do not relate to the oil sold and delivered: in these circumstances he says there is no room for equitable set-off to operate in cases of sale of goods. He cited *Leon Corporation V. Atlantic Lines (1985) 2 Lloyds L.R. 470* in support. In reply Mr. Crystal submits that there is indeed room for equitable set-off to be pleaded here, because the circumstances are such as to make it unfair for NIOC to be paid its claims without taking account of the cross-claims arising out of the alleged breaches on its part of the very contracts upon which it sues or upon a closely related contracts. In turn he relied in particular upon *Hanuk v. Green (1958) 2 Q.B. 9.* He then distinguished the 'Leon' case as resting upon a long recognised exception operating in favour of a shipowners claim to freight and now extended to a claim for charter hire, where restrictions upon the right of equitable set-off have been accepted, but with no application to a sale of goods.

A number of other pertinent authorities on this point were cited by counsel which would require a detailed examination if the point had required a decision from this Court to be rendered at this juncture. I have however taken the view that it does not; and seeing that a decision upon it may have important bearing upon the future course of this action at a later stage, it would be undesirable for me to go into the respective contentions upon either side unless required to do so. An argueable case exists on either side but in view of the conclusions which I have already reached regarding the issue of non justiciability I do not propose to resolve it here. It is sufficient for me to say that for the reasons given I do not regard the possibility of non-justiciable issues arising at trial as more than a remote possibility and so it is not a substantial factor to affect my decision whether or not to exercise the Courts discretion to stay this action. I would add before passing on that the observations of Lord Wilberforce in Buttes

Gas, in particular at pages 934-936 of the report, lead me to suppose that the approach of the U.S. Courts to issues of non-justiciability are very similar to those which commended themselves to their Lordships' House in that appeal. It follows that the District Court in Mississippi if squarely faced with issues of that nature would be unlikely to prove any more capable of resolving them than this Court would be similar circumstances.

I turn now to examine the issues of forum non conveniens and of lis abili pendens in relation to the pendency of the proceedings by NIOC in the Mississippi District Court. These are the crucial issues which arise. Before addressing them I must recall that, at an early stage of this hearing, Mr. Crystal filed with this Court a significant admission and concession on behalf of his clients in these terms:—

> "For the purpose of this action and for the purpose of the Mississippi Suit AOI is prepared to concede and now admits that at all material times in their dealings with NIOC, AOI's Bermudian subsidiaries, including AOTL, acted as agents for their disclosed principal AOI, thereby creating privity of contract between AOI and NIOC."

As Mr. Pollock pointed out this is a major reversal of the position hitherto taken up by AOI in the Mississippi proceedings and by AOTL in Bermuda. It has quite evidently been done for tactical reasons. Mr. Crystal sought to build upon it immediately by suggesting that it was now "common ground" that AOI was the sole contracting party on the Ashland side with the result that AOTL could be left out of the equation and that the action against it in Bermuda served no useful purpose. The timing was clearly precipitated by Mr. Pollocks admission that he could not support the service of the Writ on AOI out of the jurisdiction so that AOTL alone remains effectively impleaded here. As Mr. Pollock pointed out, NIOC's claim

in Mississippi is not based upon agency for a disclosed principal but rather upon the 'alter ego' doctrine of piercing the corporate veil, an arguement which is borne out by an analysis of the filed complaint there. Agency is not therefore "common ground". However, the concession and admission must lead me to examine whether the central core of the Bermuda proceedings, namely NIOC's claim for the price of the oil sold and delivered can survive it or not since that is a vital factor in the decision whether or not the continuence of the Bermuda action now serves any useful purpose.

As a general rule when an agent makes a contract solely in his capacity as agent, between his principal and a third party, he is not liable to the third party on it. However, an agent who undertakes personal liability to the third party in the course of making a contract on behalf of his principal is liable in accordance with the terms of any contractual undertaking into which he has entered. The question whether an agent who has made a contract on behalf of his principal is deemed to have contracted personally depends on the intention of the parties to be deduced from the nature and terms of particular contract and the surrounding circumstances. *See Bowstead on Agency 14th Edition Articles 111 and 112.* The present is not a case where AOI was either unknown or unidentified to NIOC as a principal when the contracts were concluded. But even in cases where an agent has contracted on behalf of a known and identified principal, the agent has been deemed to have contracted personally by having signed a contract in his own name and where no contrary intention has been expressed in another part of the contract. An example of this is to be found in *Grace Shipping v. Sharp and Co. (1987) L. Lloyds L.R. 207*, a decision of the Privy Council where Lord Goff at page 127 said: - "The naming of Phillips as charterers, even on behalf of Bina Alem, shows in the absence of any indication that they were to sign as agents only, an intention that Phillips were to be

bound". In connection with the application of these principles it is the fact that the 11th April, 1979 contract names AOTL alone as the Ashland contracting party and that it is signed on behalf of AOTL alone by Mr. Dougan as authorised representative. As to the surrounding circumstances it is worth noting that the 18th September 1977 long term contract had been similarly worded and signed. This indicates a course of dealing whereby to the knowledge of all parties AOI was contracting through AOTL. There may well be good commercial reason why a U.S. parent company would wish to put forward its offshore subsidiary as the party to contract with overseas suppliers and to arrange in turn to purchase the oil supplied from the subsidiary when delivered. In my judgment the inference to be drawn from the documentation and the surrounding circumstances here is prima facie that AOTL was to incur personal liability on this contract in addition to any liability which might attach to AOI as a disclosed principal.

This is sufficient to dispose of the argument that a continuance of the Bermuda proceedings by NIOC against AOTL in itself would serve no useful purpose. It is unnecessary therefore to examine the position as regards any personal liability of AOTL under the 11th March, 1979 Heads of Agreement, which could arise only if the plea of economic duress should succeed: unnecessary also to examine the other causes of action, such as conspiracy or tortious interference, conversion, unjust enrichment or breach of contract, which appear likely in any event to encounter formidable defences to their successful development against AOTL at trial. It follows that the questions relating to lis alibi pendens and forum non conveniens have to be approached on the basis that this is a properly consituted action in the Bermuda court where NIOC have sued AOTL for a liquidated amount on the basis of a contract of sale upon which they are liable, subject to set-offs and to counterclaims which they may be able to assert in their

defence to the whole or part of the claims now brought against them as well as to an overplus of damages. At the same time there are concurrent proceedings afoot in the U.S. District Court in Mississippi in which AOI is also sued by NIOC for the identical sums on the basis of several of the same causes of action, where it is faced by AOI with the same counterclaims and set-offs and where AOI have effectively conceded that they were the principal contracting party against whom NIOC may claim subject to those defences and cross-claims on its part, regardless of any claims they may have against AOTL elsewhere.

The law of England concerning these topics have been in a state of rapid development over the past decade and a half. The starting point is now the speech of Lord Goff in *Spiliada Maritime Corporation v. Cansulex Ltd (1987) 1 Lloyds L.R. 1* and in particular his analysis of the relevant principles at pages 10-12 of the report. This was recognized in the recent decision of the Bermuda Court of Appeal in *Fordinbridge International Agencies Ltd. v. American Centennial Insurance Co. Civil Appeal No. 15 of 1986* where these extracts were extensively quoted and applies. I need not repeat them fully here again.

It was the pivotal submission relied upon by Mr. Pollock in this case that this Court ought to inquire first whether either Mississippi or possibly New York are the natural and appropriate forum for the persuit of NIOC's claims and if it appeared that the answer was 'no', then to hold that there is no ground for a stay. The natural forum for the resolution of those claims and of the Ashland counterclaims appears to be Tehran and in particular a Tehran arbitration if connecting factors such as those mentioned by Lord Goff in Spiliada and by Lord Diplock in *MacShannon v. Rockware Glass Ltd. (1978) A.C. 795 at page 812* are listed. This litigation concerns oil produced in Iran and shipped f.o.b. an Iranian port under a contract(s) made in Iran and expressed to be subject to Iranian law. Such arbitration was the parties original choice of forum. It is

the domicile of one of the parties and most of that party's witnesses are likely to live there. Yet it is clear for reasons already set out that Tehran is not available: it does not posess competent jurisdiction. Accordingly, if Mr. Pollock's contentions are correct, this Court is bound to cease its inquiry at this point and to conclude that, since no other natural and appropriate forum is available the application for a stay must fail in limine.

I have therefore examined that speech of Lord Goff with the greatest care in order to see whether there can fairly be derived from it any support for the proposition advanced by Mr. Pollock. It is not however to be found there. At the outset Lord Goff states the basic principle in modern English as in Scottish law as being that, "a stay will only be granted on the ground of forum nom conveniens where the Court is satisfied that there is *some other available forum*, having competent jurisdiction which is *the appropriate* forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice. He then notes that the general burden of proof on this issue lies on the defendant but that "if the court is satisfied that there is *another available forum* which is prima facie the *appropriate* forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which the trial should nevertheless take place in this country" (my underlining). In the third paragraph of his formulation Lord Goff refers to "the question being whether there is *some other forum* which is clearly the *appropriate forum* for the trial of the action" and concludes that the burden on a defendant "is not just to show that England (for which read Bermuda) is not the natural or appropriate forum for the trial but to establish that there is *another available forum*, which is clearly *more appropriate*".

It is an essential concomitant of Mr. Pollocks proposition that a stay should never be granted unless the relevant

connecting factors can clearly point to a natural forum for trial of the issues and unless that natural forum once identified is seen as available for that purpose. So the exercise he envisages is one designed to establish whether such a forum actually exists and then and only then to entertain a stay of the local proceedings. By contrast, the formulation of Lord Goff in Spiliada envisages an exercise of comparison between the local forum and any competing foreign forum which may be put forward as being available for trial of the issues and which in the given circumstances might be regarded as clearly or distinctly more appropriate for that purpose. I have examined the speeches of Lord Diplock, Lord Brandon and Lord Templeman in the earlier House of Lords decision in *'The Abadin Daver' (1984) 1 Lloyds L.R. 339* to see whether there is any difference of emphasis which could be relied on in the application of this legal principle to the circumstances of the present case, but there is none discernable. The most useful passages from that authority for present purposes are those of Lord Brandon at page 351, that "mere balence of convenience cannot of itself be decisive in tilting the scales, but strong and a fortiori overwhelming balence of convenience may easily and in most cases probably will be so; that similarly the mere disadvantage of multiplicity of suits cannot of itself be decisive in tilting the scales but multiplicity of suits involving serious consequences with regard to expense or other matters may well do so". Lord Brandon went on to point out two possible undesirable consequences, firstly the possibility of two conflicting judgments of the two courts concerned and secondly, the possibility of an ugly rush to get one action decided ahead of the other. These are real possibilities arising out of the present litigation should both sets of suit continue.

Further assistance is afforded by an examination of the opinion of the Judicial Committee of the Privy Council in *Societe Nationale Indistrielle Aerospatiale v. Lee Kui Jak and others (App. No. 13 of 1987)* delivered by Lord Goff.

That was a case concerned with the legal principles applicable to the grant of an injunction to restrain foreign proceedings rather than to a stay of local proceedings as here. It was in regard to the former that Lord Goff at page 17 of the transcript laid down the principle that the court will, "generally speaking only restrain the plaintiff from persuing proceedings in the foreign court if such persuit would be vexatious or oppressive. This presupposes that, as a general rule the [local] court must conclude that it provides the natural forum for the trial of the action".

That formulation might appear at first sight to support Mr. Pollock's submission. But in the context of earlier passages and of the ratio of the decision taken as a whole, it is clear that Lord Goff was in no way seeking to modify the principles previously laid down in his speech in Spiliada as applicable to consideration of a stay of the local proceedings. the applicable principles would now appear to be very different in these two distinct classes of case, as it is natural they should be for reasons of comity, seeing that interference with the conduct of foreign proceedings is a matter of considerably greater delicacy than the restraint of proceedings in the local forum.

It is unnecessary for me to review the earlier decisions which are of interest only to a historical perspective of the development of this branch of law. For the reasons given I accept the substance of the submissions based by Mr. Crystal upon the Spilada case as the correct approach for me to adopt in the present application.

Accordingly, a comparison must now be undertaken between the Mississippi and the Bermuda fori, to determine whether the defendants have demonstrated that the former is clearly or distinctly more appropriate for trial of the issues of substance between NIOC and Ashland than the latter, in the sense of being the place where the case may be tried more suitably for the interests of all the parties and the ends of justice. So far as expense and the con-

venience of witnesses is concerned there is little to choose between them: both places are remote from Iran where NIOC is based and where the majority of its witnesses reside but close in the context of modern travel to Kentucky where AOI is based and where its witnesses are likely to reside. The law of neither place is the governing law of the contract and questions of Iranian law will fall to be determined on the basis of expert evidence wherever the trial takes place.

These factors by themselves do not therefore clearly or distinctly point in the direction of Mississippi. Are there any others of weight? I have already discounted the risk of non-justiciable issues as a factor and held that the Bermuda proceedings in themselves, cannot be said to serve no useful purpose. I cannot however ignore the factor that AOI has now formally admitted for the purposes of both proceedings that it was the principal contracting party liable to NIOC on its claims subject to the cross claims which it asserts. As the parent company of AOTL and the owner and operator of a petroleum refinery its assets must be presumed to be substantially the greater. While the connection of AOTL with Bermuda as an exempted company cannot properly be described as 'tenuous', nevertheless there is nothing is the evidence to suggest any permanent or deep routed connection beyond the operation of a modest office of AOTL with these Islands which could confer upon NIOC any legitimate advantage in persuing it to judgment here as well as persuing AOI in Mississippi on the same cause of action.

I take account too of undesirable consequences like those alluded to by Lord Brandon in Abadin Daver. The Mississippi proceedings are presently stayed pending the progress of NIOC's continuing appeals against refusal of its claim for compulsory arbitration. Only when these are disposed of can the lengthly process of discovery in the District court proceed as already ordered there prior to a trial taking place. In the meantime, if the Bermuda action

continues, I can forsee an application by NIOC here to dismiss the set off and the counterclaim which AOTL will undoubtedly advance in its Defence. It may well be suggested that these procedural points could be decided by way of preliminary issues of law before a trial, in an endeavour to secure a judgment in default of an effective defence against the subsidiary AOTL in Bermuda before the Mississippi action against the parent AOI is ready to go on for trial. This would indeed be an unseemly race for judgment with both horses coming out of the same stable. It could lead to difficult technical questions of estoppel per rem judicatem which would be best avoided in the interests of all parties and of a just outcome upon the merits.

Because I can see at the end of the day no real or substantial judicial advantage to NIOC, apart from being able to play off one set of proceedings against the other in this way, and because it is impossible to ignore the factor that it was NIOC who chose to bring both these suits against these respective defendants in the two jurisdictions concerned; because in the circumstances all the issues of substance can be effectively litigated and disposed of in the Mississippi Court where the two principal parties are already litigating at a stage considerably further advanced towards trial than in Bermuda; it appears to me that AOTL can demonstate that Mississippi is clearly and distinctly the more appropriate forum for trial of these issues in the interests of the parties and for the ends of justice than Bermuda. I so hold for these reasons and turn now to consider, in terms of Lord Goff's formulation at page 12 of the Spiliada report, whether in all the circumstances of this case justice nevertheless requires that a stay should not be granted. In particular the question to be answered is whether or not the Plaintiff has established objectively by cogent evidence that it will not obtain justice in the foreign jurisdiction, Mississippi.

The first inquiry must be what is the extent of the burden of proof resting upon the Plaintiff in this regard. Must the evidence be such as to lead me to the conclusion that NIOC will probably not receive a fair trial is Mississippi or is it sufficient if a substantial or non-fanciful risk of that occurrance is demonstrated to exist? It appears to me that the former test is better consonant with the words of Lord Goff just referred to. It is also right to have regard to the observations of Lord Diplock at page 343 of Abadin Daver, that it is quite inappropriate for our judges to undertake any supposed comparison of the quality of justice obtainable in a foreign Court and that obtainable in a local court or to allow the exercise of their discretion to stay a local action to be influenced by that. There is inevitably some risk of encountering injustice in the conduct of litigation wherever it is brought since justice is but human and procedures not infallible. The comparison of whether this risk of injustice is greater in a foreign than in a Bermuda court is otiose. Accordingly I hold that the former test is the proper approach to the question which this Court has now to decide. It remains to consider the affidavit evidence on this question to determine whether or not, taken as a whole it cogently demonstrates a liklihood that NIOC will not obtain a fair trial in the Mississippi District Court.

I have already noted that in U.S. Federal Courts there exists a constitutional right to demand trial by jury of issues between parties to a civil litigation such as those raised by the Ashland counterclaims. AOI have demanded trial by jury of those issues by their Answer filed in the Mississippi suit. NIOC however assert that by reason of the long standing and extreme antipathy of the U.S. public generally towards the Islamic Republic of Iran, a fair trial of these issues by a jury there is unlikely or indeed virtually impossible to attain.

The existence of U.S. public antipathy towards Iran is not really in doubt upon the evidence before me. It is

attested to in the affidavit of William Dorman, a California professor of journalism. Such antipathy dates back to the events of the revolution in Iran and the subsequent hostage crisis and it has recently been reinforced by the revelations of the arms scandal. Moreover this Court must take judicial notice of the current tensions in the Persian Gulf which carry with it the risk of warlike clashes between Iran and U.S. naval forces and of resultant casulties to U.S. Navy personnel. The intensity of this antipathy is a matter of greater controversy. Mr. Crystal has concentrated criticism on a 'temperature chart' exhibited to Professor Dorman's affidavit and prepared by the Gallop organisation for the Chicago Council on Foreign Relations, which purports to show Iran as the most unpopular out of several foreign nations including the U.S.S.R., but omits certain other nations such as Libya which might also be expected to score low in the regard of the U.S. Public. That chart, however, was relied on by Professor Dorman only as "the best recent example" of the low regard in which Iran is seen by him to be now held and Mr. Crystal's strictures, valid though they are, do not invalidate his conclusion. This, which is based on personal research, is that there is a deep and abiding estrangment which results in a genuine risk that potential jurors in the U.S.A. would be hostile to the Government of Iran or to such entities as NIOC. I accept that assertion on the evidence as a reasonable inference.

This is of course by itself far from discharging the burden of proof which I have held falls on the Plaintiff regarding this issue. The evidence is carried further, however by affidavits of Professor Wrightsman, a Kansas professor of Psychology and Professor Rowland, a Kansas professor of Political Science. The theme of the former is that "bias", or human predisposition to make interpretations based on past experience and learning, is liable to be reflected in the verdicts of individual jurors in specific cases. From this the Professor concludes that the number of peremp-

tory challenges available in a Federal Court (three on each side) are not sufficient in numbers to eliminate biased jurors from the panel. This is a thesis repeated by Professor Rowland, but the latter goes further and seeks to build upon the temperature thermometer exhibited by Professor Dorman a theory that 95% of the population of the U.S.A. have negative feelings toward Iran. He then proceeds statistically to calculate the probability of convening a jury panel there which includes three venireman having neutral or favourable feelings towards Iran is less than 1 in 10,000.

In my judgment the premise and reasoning employed to reach this startling conclusion is demonstrally unsound. Not only is the temperature chart inadequate as a reliable gauge of the precise intensity of negative feelings towards Iran amongst any given segment of the U.S. population but to compute the odds in the manner postulated without stating the size of the jury panel to be convened is to ignore an indispensible statistic in the equation.

As Erwin Griswold, former Solicitor General of the U.S.A. points out in his affidavit, the system of three peremptory challenges in U.S. federal jury trials is supplemented by the system of a 'voir dire' by which potential jurors are to be examined by the presiding judge and/or by counsel for the litigants and questioned with a view to exposing any lack of due impartiality. It has been shown that the scope and range of voir dire questioning can vary widely between cases and in a case where widespread feelings of antipathy are to be anticipated as for instance in the prosecution of Lt. Calley, very wide-ranging and deep searching questions are likely to be asked. Mr. Griswold also refers to procedures such as charge of venue and continuience (or adjournment) designed to minimize the risks posed by bias on the part of potential jurors, as well as to the appellate procedures of the U.S. justice system designed to monitor the working of the voir dire system with a view to correcting any occasional lapses that may occur.

It is of the essence of the Defendants case on this issue that the system is designed and adapted to detect feeling of bias on the part of potential jurors and, in conjunction with the system of peremptory challenge, to eliminate the risk of seating jurors to try an issue which they are consciously or unconsciously incapable of considering or of deciding on its merits. It is of the essence of the Plaintiff's case that such a system with the best will in the world is not capable in practice of either detecting or still less of surely eliminating juror bias in a case where widespread and perhaps intense antipathy exists on the part of the public towards one but not the other of two litigating parties, as they say is the likely situation here.

A great deal of evidence has been filed on this issue, including Affidavits from Mr. Donald Vinson and further affidavits from Professor Rowland and Wrightman. The view of those experts are as divergent as the fields of their respective expertise and it is not an easy task in the absence of oral evidence and cross-examination to assess credibility and assign appropriate weight to their opinions. I am prepared to accept the thesis that conscious or unconscious bias or predisposition on the part of the potential jurors may affect their decisions upon particular issues in a courtroom but I am not prepared to hold that the U.S. Federal judicial system is inadequate even in a case such as the present litigation in Mississippi to detect such bias or predisposition and to correct it through the use of the voir dire coupled with peremptory challenges. The basic weakness of the Plaintiffs case is that even if the evidence produced warrants the general conclusions arrived at by its experts, the particular conclusions as to likelihood of unfairness in the present litigation are not legitimate inferences from those generalities. It is insufficient in particular to justify any finding on my part -

1) as to the precise level or intensity of current negative feelings towards Iran in Jacksonville Mississippi

or amongst any other typical segment of the U.S. public; or

2) that because of the extent and intensity of such feelings the U.S. justice system is unlikely to detect existence of such feelings before veniremen are seated on a jury, through the proper use of voir dire; or

3) that the judge in Mississippi is unlikely to take appropriate action to supplement the use of peremptory challenges and so excuse veniremen who are perceived as incapable of considering and deciding the issues with due impartiality.

Accordingly, although there is some risk which cannot be described as fanciful, that the system might fall, as there is evidence before me it may have done in some earlier criminal litigation in the U.S. Courts, to eliminate prejudice from the makeup of a future jury empannelled to try issues between AOI and NIOC in Mississippi, that is not shown to be the likely outcome. The Plaintiff has failed to demonstrate by cogent evidence to my satisfaction that is will probably not get a fair trial in Mississippi. There are no other special circumstances present which would militate against the granting of a stay of NIOC's action in Bermuda against AOTL in accordance with the general rule.

I am conscious that there are several issues which were explored by counsel in arguement which I have left on one side or examined cursorily. This implies no disrespect to the careful development of their submissions but merely reflects the view which I have formed that these issues, are in the final analysis, but periphral to the essential matters which require the Court's decision now.

For the reasons I have endeavoured to convey, there will be an order for stay substantially in terms of paragraphs 1 (a) and (c) of the First Defendants summons of 30th September 1986.

Dated 16th July 1987

J. Collett
PUISINE JUDGE

Supreme Court, U.S.
FILED
OCT 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL IRANIAN OIL COMPANY,
Petitioner,

v.

ASHLAND OIL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

KEITH E. PUGH, JR.
(Counsel of Record)
ROBERT J. BROOKHISER
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800

WILLIAM F. GOODMAN, JR.
PAUL H. STEPHENSON III
WATKINS & EAGER
Eastover Bank Building, Suite 800
P.O. Box 650
Jackson, Mississippi 39205
(601) 948-6470

Counsel for Respondent Ashland Oil, Inc.

Dated: October 20, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

This case arises in the context of an international commercial dispute which is—or has been—the subject of litigation or arbitration in the United States, Bermuda, England and Iran. Petitioner, an instrumentality of the Government of Iran, filed a breach of contract suit for damages in federal district court in Mississippi. After respondent filed counterclaims and discovery requests, petitioner then sought to compel arbitration in Mississippi pursuant to an agreement it had drafted which provides for arbitration in Iran. There is no dispute that the district court lacks the statutory power to compel arbitration at the location specified in the agreement and also that there has been no agreement to arbitrate anywhere else, including Mississippi. Notwithstanding its present insistence on arbitration in the United States, petitioner is also attempting to pursue litigation of the same dispute in Bermuda.

The question presented is:

> Whether, in light of the unusual facts and procedural circumstances of this case, the court of appeals erred in affirming the decision of the district court which refused to compel arbitration in Mississippi.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner, National Iranian Oil Company, and respondent, Ashland Oil, Inc.*

* Pursuant to Rule 28.1 of this Court, Ashland Oil, Inc. states that, with the exception of Melamine Chemicals, Inc., it has no subsidiaries or affiliates that have outstanding securities that are publicly traded.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
COUNTERSTATEMENT OF THE CASE	2
A. The Dispute Between the Parties	2
B. Other Proceedings Involving This Dispute	4
1. Iran	4
2. England and Bermuda	5
C. The Proceedings Below	6
1. The Decision of the District Court	7
2. The Decision of the Court of Appeals	8
REASONS FOR DENYING CERTIORARI	10
I. THE PETITION DOES NOT PRESENT ANY ISSUE OF GENERAL PUBLIC IMPORTANCE	11
A. The Decision Below Is Limited to the Procedural and Factual Circumstances of This Case	11
B. The Decision Below Does Not Threaten to Undermine Commercial Relations Between the United States and Its Trading Partners	13
II. THE DECISION BELOW WAS CORRECT AND DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, ANY OTHER COURT OF APPEALS OR THE STRONG FEDERAL POLICY IN FAVOR OF ARBITRATION	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Continental Grain Co. v. Dant & Russell, Inc., 118 F.2d 967 (9th Cir. 1941) ---- 16
First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) ---- 12, 13
Hilton v. Guyot, 159 U.S. 113 (1895) ---- 15
Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974) ---- 15
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) ---- 11, 17
McCarthy v. Bruner, 323 U.S. 673 (1944) ---- 13
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) ---- 17
Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc., 819 F.2d 400 (3d Cir. 1987) ---- 16
Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543 (D.C. Cir. 1987) ---- 14
Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) ---- 18
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) ---- 11
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) ---- 17
Smith v. Butler, 366 U.S. 161 (1961) ---- 13
Snyder v. Smith, 736 F.2d 409 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984) ---- 16
Tahan v. Hodgson, 662 F.2d 862 (D.C. Cir. 1981) ---- 15

STATUTES:

9 U.S.C. § 3 (1982) ---- 14
9 U.S.C. § 4 (1982) ---- 2, 6, 7, 8, 9, 14, 16
9 U.S.C. §§ 201-08 (1982) ---- 7
9 U.S.C. § 206 (1982) ---- 7

MISCELLANEOUS:

31 C.F.R. § 535.222 (1986) ---- 7
Exec. Order No. 12294, 46 Fed. Reg. 14,111 (1981) ---- 7
Uniform Foreign Money-Judgments Recognition Act §§ 2, 3; 13 Uniform Laws Ann. 264 (1986) ---- 15
21 U.S.T. 2517 (1970) ---- 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-459

NATIONAL IRANIAN OIL COMPANY,
Petitioner,

v.

ASHLAND OIL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Ashland Oil, Inc. ("Ashland") files this Brief in Opposition to the Petition for a Writ of Certiorari filed by petitioner, National Iranian Oil Company ("NIOC").

OPINIONS BELOW

The opinion of the court of appeals (App. 4a-21a) is reported at 817 F.2d 326 (1987).[1] The opinion of the

[1] As used herein, "App." refers to the Appendix to the Petition, "Pet." refers to the Petition, and "R." refers to the record on appeal. For the convenience of the Court, a copy of the record on appeal and other material filed with the courts below and referred to in this Opposition has been lodged with the Clerk of the Court.

United States District Court for the Southern District of Mississippi (App. 22a-26a) is reported at 641 F. Supp. 211 (1986).

COUNTERSTATEMENT OF THE CASE

The underlying dispute between the parties concerns NIOC's failure to honor a long-term crude oil supply agreement and Ashland's [2] consequent refusal to pay for several shipments of crude oil by way of set-off. This dispute is (or has been) the subject of litigation or arbitration in the United States, Bermuda, England and Iran. The issue before the lower courts was whether, under the circumstances of this case, Section 4 of the Federal Arbitration Act, which provides that a court may compel arbitration (i) "within [its] district," (ii) "in accordance with the terms of the agreement," requires the district court to compel arbitration in Mississippi pursuant to an agreement drafted by NIOC that provides for arbitration in Iran.

A. The Dispute Between the Parties

From 1973 to October 1978, NIOC was a primary source of crude oil for Ashland pursuant to long-term contracts. (App. 5a.) In late 1978 after the Islamic revolution began, NIOC suspended crude oil deliveries to Ashland under these contracts, forcing Ashland to purchase more expensive crude oil on the world spot market.

---

[2] In this brief, references to Ashland include its Bermuda subsidiaries which acted as its agents in dealings with NIOC.

As indicated in the Petition, Ashland has conceded, both in this case and in related litigation brought by NIOC in Bermuda, that it is in privity of contract with NIOC on the agreements and transactions involved in this dispute. Prior to the decision below, Ashland had offered to concede this point as part of a comprehensive proposal to stay the Bermuda litigation in favor of proceedings in the United States. (Exhibit to Ashland's July 2, 1987 Memorandum in Opposition to Appellant's Motion to Stay Issuance of Mandate Pending Application for Certiorari.) NIOC rejected this proposal.

(R. 64-65.) In early 1979, NIOC offered to resume long-term sales to Ashland on the condition that several spot cargoes of crude oil were purchased at premium prices. (R. 67-68.) After the spot cargoes had, in fact, been purchased, Ashland and NIOC signed a Heads of Agreement on March 11, 1979. (R. 71.) The Heads of Agreement provided for NIOC to supply Ashland with 150,000 barrels of crude oil per day from April 1, 1979 through December 31, 1981. (*Id.*)

One month later, on April 10, 1979, at a meeting with Ashland representatives at NIOC's offices in Tehran, NIOC repudiated the Heads of Agreement. (App. 23a.) NIOC insisted that Ashland's representatives sign a much less favorable form of contract, "Contract No. 106," covering a much shorter period of time (9 versus 33 months) and a substantially reduced daily quantity of oil (115,000 versus 150,000 barrels per day). (App. 22a-23a.) NIOC also insisted that Ashland representatives sign a "side letter," which purported to terminate the Heads of Agreement as well as earlier contracts which had been suspended in late 1978. In order to mitigate damages and secure some performance by NIOC, Ashland's representatives signed both the side letter and Contract No. 106 under duress. (R. 75-76.)

Article X of Contract No. 106 provides for arbitration of "[a]ny dispute between the parties arising out of this Contract." (App. 39a.) Article X also provides that "[t]he seat of arbitration shall be in Tehran, unless otherwise agreed by the parties," that Iranian law governs the interpretation of any arbitral award, and that, if appointment of an arbitrator is necessary, "the interested party may request the President of the Appeal Court of Tehran" to make the appointment. (*Id.*)

Throughout 1979, NIOC repeatedly breached Contract No. 106. NIOC progressively reduced the supply of crude oil (from 115,000 to 95,000 barrels per day) while requiring the purchase of several additional spot cargoes

of crude oil at prices ($36 to $45 per barrel) double those under Contract No. 106, as a condition for continued supply under long-term contract. (R. 76-77, 80.)

Following the seizure of the hostages at the United States Embassy in Tehran on November 4, 1979, NIOC cancelled further deliveries of crude oil under Contract No. 106. (App. 23a.) At that time, several shipments of crude oil, including spot cargoes not under Contract No. 106, were in route to Ashland. (*Id.*) When NIOC failed to present the proper documentation necessary to secure payment for these cargoes under previously arranged letters of credit with various banks, NIOC sought payment directly from Ashland. (*Id.*) Since damages from NIOC's breaches of the Heads of Agreement and Contract No. 106 exceeded the amount of the invoices on these shipments, Ashland did not pay them, and, by written notice dated February 20, 1980, offset its damages against NIOC's charges on these shipments. (*Id.*)

B. Other Proceedings Involving This Dispute

Prior to, and concurrent with, NIOC's attempt to compel arbitration in federal court, this dispute has been the subject of litigation and/or arbitration in several jurisdictions. NIOC has attempted to gain selective advantage by the very "tactical jockeying for position" of which it accuses Ashland.

1. *Iran.* In November 1983, NIOC sought to commence arbitration in Tehran under Contract No. 106 by sending Ashland a "Notice of Arbitration" with respect to $282 million in invoiced oil deliveries.[3] (R. 19.) Ash-

[3] In November 1980, Ashland filed suit against NIOC in the United States District Court for the Southern District of New York for breach of both the Heads of Agreement and Contract No. 106. (R. 181-94.) This action was suspended pursuant to Executive Order and regulations of the Office of Foreign Assets Control of the Department of Treasury which implemented the Algerian Accords, adhered to by the United States to gain release of the American hostages from Iran. *See* n. 7, *infra*.

land declined to participate in any such arbitration, citing a number of defects and defenses to NIOC's demand, as well as the political and legal circumstances and unsafe conditions prevailing in Iran. (R. 171-78.) Subsequently, in May 1984, NIOC began judicial proceedings in the Public Court of Tehran to appoint an arbitrator for Ashland. (R. 196-200.) The Public Court denied NIOC's application. (R. 176.)

2. *England and Bermuda.* Thereafter, in the fall of 1985, NIOC filed but did not serve essentially identical suits against Ashland in both England and Bermuda, seeking damages of $89 million for breach of Contract No. 106 and $193 million for breach of other alleged contracts, *i.e.*, the spot sales.[4] (R. 201-09.) Neither suit seeks to compel arbitration.

After obtaining a stay of proceedings in the district court pending the appeal below,[5] NIOC commenced active litigation in Bermuda in September 1986 by serving the complaint on Ashland. NIOC refused to enter into a standstill agreement and vigorously opposed all efforts by Ashland to stay the duplicative Bermuda proceedings in favor of the proceedings NIOC had begun in Mississippi. On July 16, 1987, after a three and one-half week hearing, the Bermuda court directed that the Bermuda proceedings be stayed in favor of those pending in the Mississippi district court, noting that it could see "no real or substantial judicial advantage to NIOC, apart from

---

[4] According to NIOC, both the Bermuda and English actions are "protective suits," filed in order "to toll the statutes of limitations." (NIOC's April 3, 1986 Memorandum in Opposition to Ashland's Motion to Dismiss at 2 & n.1, 10, 11.)

[5] In seeking a stay from the court of appeals, NIOC represented that "litigation is the very antithesis of arbitration" (NIOC's August 5, 1986 Reply Memorandum in Support of Motion for a Stay at 2) and that its right to arbitrate "will be irreparably impaired" by continued litigation (NIOC's July 29, 1986 Memorandum in Support of Motion for a Stay of Proceedings at 12).

being able to play off one set of proceedings against the other. . . ." (App. 46a, 69a.) NIOC has appealed this decision.

C. The Proceedings Below

On November 18, 1985, NIOC filed this case against Ashland in the United States District Court for the Southern District of Mississippi.[6] Despite NIOC's current position that it does not want to litigate but only seeks to arbitrate in the United States, NIOC did not file a simple petition to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 4 (1982). Instead, NIOC filed a four-count complaint. The first three counts seek recovery of $282 million in damages for breach of contract, for unjust enrichment, and for the price of goods sold and delivered. (R. 3-5.)

Although the last count in the complaint seeks an order compelling arbitration, NIOC did not initially seek to compel Ashland to arbitrate. It was only after Ashland filed its Amended Answer and Counterclaim (R. 52-86) and served discovery requests on NIOC (R. 89-118), that NIOC filed its application to compel arbitration in Mississippi[7] and to appoint an arbitrator on Ashland's be-

---

[6] Mississippi is one of only a few states with a six-year rather than a four-year statute of limitations on contract claims. NIOC selected Mississippi as a forum and timed the filing of its complaint so as to contend that under the Mississippi statute of limitations, NIOC may pursue its claims against Ashland but that Ashland's counterclaims against NIOC accrued earlier and are time barred as a result. (App. 18a.)

[7] Although NIOC's application seeks to refer all claims and counterclaims in the case to arbitration (R. 149), it is NIOC's position that Ashland's counterclaims have already been extinguished and cannot be raised either in litigation or in arbitration. (Brief of Appellant at 12 n.6.) According to NIOC, Ashland's counterclaims were extinguished by operation of the Algerian Accords when Ashland did not file them with the Iran-United States Claims Tribunal.

half (the relief denied it by the Iranian courts). Ashland responded and moved to dismiss on a number of grounds, including the district court's lack of power to compel arbitration within its district pursuant to an agreement to arbitrate elsewhere. (R. 166, 171.)

1. *The Decision of the District Court*

On June 27, 1986, the district court denied NIOC's application to compel arbitration. The district court held that 9 U.S.C. § 4 permits a district court to compel arbitration (1) only in its judicial district and (2) only in accordance with the terms of the agreement to arbitrate (App. 24a-25a) and that, under the circumstances, it lacked the power to compel arbitration in Mississippi for the "convenience" of the parties.[8] (App. 26a.) The district court did not reach any of the other issues raised in opposition to NIOC's application. Subsequently, however, the district court found that the spot sales, which comprise the bulk of NIOC's claims, were not subject to any agreement to arbitrate. (R. 281.)

(*Id.*) However, Executive Order No. 12294, 46 Fed. Reg. 14,111 (1981) and companion regulations of the Treasury Department, 31 C.F.R. § 535.222 (1986), which implement the Accords, expressly provide for such counterclaims. NIOC's motion to dismiss Ashland's counterclaims is pending before the district court.

[8] The district court also ruled that it lacked the power to compel arbitration "at any place specified in the agreement" pursuant to 9 U.S.C. § 206 (1982) because Iran, the site specified in the arbitration agreement, is not a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1970), and 9 U.S.C. §§ 201-08 (1982) ("Convention"). (App. 24a.) The Convention has now been adhered to by 71 countries, including most of the world's major trading nations. On the basis of reciprocity, Congress expressly limited the benefits of the United States' adherence to the Convention to arbitration in another signatory country. NIOC did not appeal this aspect of the district court's ruling.

2. *The Decision of the Court of Appeals*

NIOC appealed. The sole issue NIOC presented to the court of appeals was "[w]hether the United States Arbitration Act, 9 U.S.C. § 1, et seq., empowers the District Court to order arbitration in the district where it sits when the arbitration clause sites the proceeding elsewhere . . . ." (Brief of Appellant at 1.)

Contrary to NIOC's suggestion, the court of appeals did not treat NIOC's claims cavalierly. It did not summarily affirm the district court's opinion. Instead, on May 22, 1987, the court issued a detailed, well-reasoned opinion which considered all of NIOC's arguments and affirmed the district court on several alternate grounds.

The court of appeals expressly declined to hold that Section 4 of the Arbitration Act absolutely prohibits a district court from compelling arbitration within its district when the agreement to arbitrate specifies a different location. "[W]e have not taken such a literal approach to the two part mandate of section 4." (App. 11a.) Instead, the court of appeals *agreed* with NIOC that "there may be some cases in which district courts are empowered to compel arbitration notwithstanding the parties' contractually established forum . . . ." (App. 12a.)

The court of appeals concluded, however, that "this is not such a case." (App. 12a.) It reached this conclusion after considering, and properly rejecting, NIOC's arguments that the circumstances of this case and the strong federal policy in favor of arbitration require compulsory arbitration in a forum (Mississippi) different from the one specified in the agreement it drafted.

a. The court first addressed NIOC's contention that it had waived its right to the benefit of the Iranian forum-selection clause by seeking to compel arbitration in Mississippi. The court correctly found that NIOC had

not waived any such right because, as NIOC itself conceded (App. 13a), it had no right, under either Section 4 of the Arbitration Act or the Convention, to compel arbitration in Tehran. Moreover, NIOC had already sought—and might still seek—to arbitrate the dispute in Iran. (*Id.*)

b. The court next considered whether the "inconvenience" of participating in an arbitration in Tehran required it to sever the forum-selection clause and compel Ashland to perform what NIOC argued was the essential term of the agreement, *i.e.*, arbitration. The court properly held that this was not required, basing its conclusion on at least four alternate and independent grounds, each of which was limited to the facts of the case before it.

(i) The court first concluded that NIOC was not entitled to disregard the forum-selection clause on the basis of impossibility or commercial impracticability. NIOC had reason to know at the time it drafted the agreement that Tehran might become an "inconvenient" forum (two months earlier in February 1979 the United States Embassy was attacked and 100 hostages were briefly taken). (App. 16a.)

(ii) In addition, the court found that NIOC was not entitled to disregard the forum-selection clause because, as a part of the Iranian government, NIOC shared responsibility for the chain of events which made it impractical or impossible to arbitrate in Tehran. (App. 17a.)

(iii) The court also concluded that NIOC had not shown that the clause specifying arbitration in Tehran (where NIOC's offices are located) was severable from the rest of the arbitration provision in NIOC's standard form contract. The court noted that the agreement drafted by NIOC provided that Iranian law governed the interpretation and rendition of any award, and that

the President of the Appeal Court of Tehran could "appoint the second arbitrator or the third arbitrator as the case may be." (App. 18a.)

(iv) Finally, the court found that there was no reason to conclude that the parties contemplated Mississippi as an alternate arbitral site. The court observed that NIOC selected Mississippi as the forum below because of Mississippi's favorable limitations period. (App. 18a.) The court also stressed that the parties could never have compelled arbitration at the designated site (App. 19a); that, had NIOC wanted an arbitration agreement that was specifically enforceable by the United States courts, it could have designated a forum in any of the many countries that are signatories to the Convention or any of the states where Ashland does business (*id.*); and, finally, that the court could not simply rewrite the agreement of the parties after the fact (*id.*).

NIOC sought rehearing *en banc* on the same grounds contained in its petition here. Rehearing was denied on June 22, 1987, with no judge on the full court requesting a vote on rehearing *en banc*. *National Iranian Oil Co. v. Ashland Oil, Inc.*, 823 F.2d 552 (5th Cir. 1987). Thereafter, NIOC sought a stay of the court's mandate pending the filing of a petition for a writ of certiorari, noting that the issue presented here is one "of first impression under the Arbitration Act." (Motion to Stay Issuance of the Mandate at 8.) On July 7, 1987, the motion to stay was denied.

REASONS FOR DENYING CERTIORARI

The petition should be denied because the holding of the court of appeals is correct, does not conflict with the holdings of this Court or any other court of appeals and does not present an important question for resolution by this Court.

I. THE PETITION DOES NOT PRESENT ANY ISSUE OF GENERAL PUBLIC IMPORTANCE

A. The Decision Below Is Limited to the Procedural and Factual Circumstances of This Case

The decision of the court of appeals is based on the meaning and effect of the specific terms of the arbitration agreement drafted by petitioner and on the application of accepted legal principles to the specific procedural and factual circumstances of this case. Because it is unlikely that the same issues will arise in the future, the decision does not present issues of general public importance beyond the interests of the parties and is therefore not appropriate for this Court's certiorari review. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (issues must be "beyond the academic or the episodic").

In an effort to secure Supreme Court review, petitioner ignores the narrow basis of the court of appeals' decision, suggesting that the decision establishes broad new standards for enforcement of arbitration agreements with potentially wide-ranging repercussions. Petitioner's fundamental argument is based on the mistaken premise that the court of appeals held that a district court cannot compel arbitration within its district pursuant to an agreement which specifies arbitration at a different location.[9] (Pet. at 5, 7, 11.) That is simply not what the court held. As the court of appeals expressly stated,

---

[9] Petitioner also seeks review by this Court with respect to one issue that was not even discussed in the decision below (the propriety of a stay, *see* n.12, *infra*) and another issue that was, at most, one of several alternate grounds for concluding that arbitration need not be compelled here (NIOC's responsibility, as an Iranian governmental entity, for the events making its impossible to arbitrate in Iran, *see* n.10, *infra*).

"we have not taken such a literal approach to the two part mandate of section 4." (App. 11a.) Instead, the court held that "there may be some cases in which district courts are empowered to compel arbitration notwithstanding the parties' contractually established forum or outside of the district in which the courts sit." (App. 12a.)

The essence of the decision below is the court's very narrow holding that "*this* is not such a case." (*Id.*; emphasis added.) This holding was based on the court's consideration of the specific facts and circumstances in the case before it. The court first concluded that petitioner had not waived its right to rely on the contractually designated forum because, as petitioner itself conceded, it had no right under either the Arbitration Act or the Convention to compel arbitration in Tehran in the first place, and because petitioner had already attempted, and might still attempt, to arbitrate these disputes in Tehran.

The court also concluded that even if NIOC had waived its right to arbitrate in Tehran, the forum-selection clause in the arbitration agreement could not be disregarded on grounds of "inconvenience" or commercial impracticability since: (i) NIOC had reason to know when it drafted the arbitration agreement that Tehran was or might become an "inconvenient" forum; (ii) NIOC, as an Iranian governmental entity, bears responsibility for the chain of events making it impossible to arbitrate in Tehran;[10] (iii) the forum-selection clause was

---

[10] Petitioner argues at length that review by this Court is warranted due to an alleged conflict between this limited aspect of the decision below and *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), and other courts of appeals' decisions. (Pet. at i, 5, 12-16.) There is no conflict. The decisions cited by petitioner deal with the liability of foreign states or state-owned enterprises and not whether a state-owned enterprise should be able to disregard provisions in agreements made "impracticable" by the government of which it is a part. Moreover, while

not severable from the rest of the agreement to arbitrate because of the close connection between the location specified and other aspects of the arbitration, *i.e.*, governing law and appointment of arbitrators, and finally, (iv) there was no indication that Mississippi was ever contemplated by either party as an alternate arbitral forum.

Since these narrowly based rulings are limited to the particular facts of this case and not likely to arise in the future, they do not present any significant issues that require this Court's consideration.

B. The Decision Below Does Not Threaten to Undermine Commercial Relations Between the United States and Its Trading Partners

Even if the decision below were not limited to the facts of this case, it would not have the dire consequences

---

First National City Bank held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," 462 U.S. at 626-27, it also held that the separateness of the instrumentality may be disregarded when it would be inequitable not to do so. 462 U.S. at 630, 632. That is the case here, when NIOC affirmatively relies on its status as an Iranian governmental entity or as part of "Iran," as defined in the Algerian Accords, (i) to invoke the jurisdiction of the United States courts (R. 1), (ii) to deny Ashland's right to a jury trial in the case below (R. 128), (iii) to assert that Ashland's counterclaims cannot be litigated *or* arbitrated because they are committed to the exclusive jurisdiction of the Iran-United States Claims Tribunal (Brief of Appellant at 12 n.6), and (iv) to assert immunity from Ashland's counterclaims (R. 120).

Even if there was a theoretical conflict between *First National City Bank* and this aspect of the decision below, certiorari would be inappropriate. The alleged conflict is not an essential aspect of the decision but is only one of several alternate and independent bases for the court's conclusion that the forum-selection clause could not be ignored on grounds of "inconvenience," "impossibility" or "commercial impracticability." *Smith v. Butler*, 366 U.S. 161 (1961); *McCarthy v. Bruner*, 323 U.S. 673 (1944).

which petitioner hypothesizes. Petitioner suggests that, as a result of the decision below, United States companies will default *en masse* on agreements which provide for arbitration in countries that are not signatories to the Convention. According to petitioner, commercial disputes involving trade with these nations will inevitably result in litigation in national court systems.[11]

That is not the case. Even under a literal interpretation of Section 4 of the Arbitration Act (specifically eschewed by the court of appeals), United States companies are not free to ignore agreements to arbitrate in non-Convention countries. Whether or not the parties to such agreements can be compelled to arbitrate in the United States, the Arbitration Act provides a mechanism to prevent United States companies from initiating and pursuing litigation on arbitrable claims arising out of such agreements. As petitioner itself recognizes (Pet. at 17-18), if the other requirements of the Act are satisfied, Section 3 permits a district court to stay litigation on arbitrable claims.[12] *See also Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1545 n.2, 1552 (D.C.

---

[11] Petitioner points to the volume of trade between the United States and non-Convention countries as an indication of the significance of the decision below. (Pet. at 6.) Petitioner provides no indication, however, of the extent to which such trade consists of contracts containing agreements to arbitrate in non-Convention countries. Moreover, as the court of appeals recognized, residents of non-Convention countries can insure their ability to compel arbitration through the United States courts by selecting a site within a Convention country. (App. 19a.)

[12] Petitioner contends that the court of appeals' decision is wrong and conflicts with cases interpreting Section 3 because it did not stay the litigation below. (Pet. at 17-18.) There is no basis for Supreme Court review on this point. The decision below does not even discuss the issue of a stay. This is not surprising because NIOC did not raise this issue on appeal. (Brief of Appellant at 1.) Moreover, NIOC cannot stay the litigation below on the basis of an agreement to arbitrate when *it* is the party that initiated the litigation and when *it* actively seeks to pursue duplicative litigation in Bermuda.

Cir. 1987) (as Department of Justice apparently urged as *amicus*, default judgment vacated to permit assertion of, *inter alia*, arbitration defense) (*cited* in Pet. at 10 n.9).

Nor is it likely that United States companies will simply ignore demands to arbitrate in non-Convention fora. Arbitration may take place at the designated location in the absence of one of the parties. Assuming that the arbitration were otherwise proper, it may be possible to enforce a resulting award in the United States by having the award confirmed by the courts of the country in which the arbitration took place. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895) (enforcing foreign judgment procured according to principles of fairness and due process); *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1318-19 n.6 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974) (enforcing foreign judgment which confirmed arbitral award); *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981) (enforcing foreign default judgment). *See also* Sections 2 and 3 of Uniform Foreign Money-Judgments Recognition Act, 13 Uniform Laws Ann. 264-65 (1986).

There is no reason to assume that recourse to these enforcement procedures will result in the wholesale disregard of arbitration agreements by United States companies to the detriment of trade with non-Convention countries. Petitioner cites no instance in which any court has addressed the issue of whether to compel arbitration within the United States when the designated location for arbitration was in a non-Convention country. If this were a significant problem, the issue would have arisen long before now. However, as petitioner acknowledged below, the issue raised by the court of appeals' decision is one "of first impression under the Arbitration Act." (*See* p. 10, *supra.*) Under the circumstances, Supreme Court review is unnecessary and inappropriate.

II. THE DECISION BELOW WAS CORRECT AND DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, ANY OTHER COURT OF APPEALS OR THE STRONG FEDERAL POLICY IN FAVOR OF ARBITRATION

The court of appeals carefully considered and rejected the arguments raised here by petitioner. The decision below was correct and fully in accordance with applicable Supreme Court and other precedent, as well as the policy of the Arbitration Act.

Petitioner contends that the decision below conflicts with the decisions of other courts of appeals which "uniformly recognize that strict adherence to the forum selection clause is not required." (Pet. at 11, citations omitted.) This contention ignores the court's actual holding, its explicit statement that "we have not taken such a literal approach to the two part mandate of section 4" (App. 11a), and its recognition that "there may be some cases in which district courts are empowered to compel arbitration notwithstanding the parties' contractually established forum or outside of the district in which the courts sit." (App. 12a.) Moreover, petitioner misconstrues the holdings of other courts of appeals, all of which are consistent with the decision below. *See, e.g., Snyder v. Smith*, 736 F.2d 409 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984) (vacating award entered in arbitration compelled at location contrary to forum specified in agreement); *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987) (clause specifying forum for litigation not inconsistent with obligation to arbitrate); *Continental Grain Co. v. Dant & Russell, Inc.*, 118 F.2d 967 (9th Cir. 1941) (party could not complain of arbitration within district in which it filed petition to compel).[13]

---

[13] To the extent the court of appeals distinguished its approach to Section 4 from the holdings of some other courts confronted with different factual circumstances, it adopted petitioner's interpre-

Petitioner also contends that the decision below conflicts with decisions of this Court. Petitioner attempts to create such conflicts by citing general language from these decisions and ignoring the factual and procedural differences between the cases it cites (none of which involved the power of the district court to compel arbitration outside the forum specified by the parties) and the present case. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, 516-17 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Accordingly, there are no conflicts of law which might support Supreme Court review. *See, e.g., Layne & Bowler Corp. v. Western Well Works*, 261 U.S. at 393.

Nor is there any conflict, as petitioner suggests, between the federal policy in favor of arbitration and the decision below. The court of appeals expressly recognized and endorsed the strong policy in favor of arbitration which it has repeatedly followed and reaffirmed in other cases. (App. 19a-20a.) It also recognized and endorsed the policy in favor of the arbitration of international commercial disputes. (App. 20a.)

It is not the case, as petitioner urges, that effectuation of federal arbitration policy requires specific enforcement of the arbitration agreement here. As both the court of appeals and this Court have recognized, there are limits to federal arbitration policy and not every dispute is subject to arbitration. (*Id.*) In this case it would have been perverse and contrary to arbitration policy for the district court to have granted NIOC's application. NIOC is not seeking to enforce the agreement it "bargained for," but instead is asking the district court to expand its (but not Ashland's) rights under the arbitration agreement. The agreement to arbitrate was never

---

tation of the statute. If the court had adopted a "literal approach," the application to compel arbitration would have been denied without further analysis.

specifically enforceable by the United States courts at the site designated in the contract and neither NIOC nor Ashland could ever have compelled the other to arbitrate in Iran.[14] Nevertheless, NIOC claims the right to compel Ashland to arbitrate at a place not designated in the contract, *i.e.*, Mississippi (or any other place in the United States Ashland may be found). Ashland would have no reciprocal right, however, since NIOC is not found in the United States and other countries generally do not permit specific performance of arbitration agreements.

Compelling arbitration in Mississippi would also increase NIOC's rights to enforce any award in its favor, again without concomitant benefits to Ashland. Whereas an award in NIOC's favor in an Iranian arbitration would not be entitled to the confirmation and enforcement procedures available in the United States under either the Arbitration Act or the Convention, an award in NIOC's favor in a Mississippi arbitration would be entitled to such confirmation and enforcement in the United States under the Arbitration Act. In marked contrast, an award issued in Ashland's favor in a Mississippi arbitration could not be readily enforced against NIOC either in the United States (where NIOC is believed no longer to have assets), or in Iran (which is not a signatory to the Convention). In these circumstances, the relief sought by NIOC below is not required. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (purpose of the Arbitration Act "was to make arbitration agreements as enforceable as other contracts, but not more so").

---

[14] As the court below found, NIOC could have made its agreement to arbitrate specifically enforceable by the United States courts by specifying an arbitration site in any of the countries which have adhered to the Convention. (App. 19a.) For obvious reasons of its own advantage and, perhaps, to preclude international enforcement of the arbitration clause in its standard form contracts, NIOC instead chose Iran as the site for arbitration.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

KEITH E. PUGH, JR.
(Counsel of Record)
ROBERT J. BROOKHISER
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800

WILLIAM F. GOODMAN, JR.
PAUL H. STEPHENSON III
WATKINS & EAGER
Eastover Bank Building, Suite 800
P.O. Box 650
Jackson, Mississippi 39205
(601) 948-6470

Counsel for Respondent
Ashland Oil, Inc.

Dated: October 20, 1987

Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL IRANIAN OIL COMPANY,
Petitioner,

v.

ASHLAND OIL, INC.,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY BRIEF

STEPHEN M. TRUITT
Counsel of Record
MARK SCHATTNER
SUSAN L. LAUNER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

ALEX A. ALSTON, JR.
CHARLES R. DAVIS
THOMAS, PRICE, ALSTON,
JONES & DAVIS
121 North State Street
Jackson, MS 39215-1532
(601) 948-6882

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
PETITIONER'S REPLY BRIEF	1
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	Page
First National Citibank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983)	5,6
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1976)	3,4
STATUTES AND REGULATIONS:	
9 U.S.C. § 3	5
9 U.S.C. § 4	5
9 U.S.C. §§ 201 *et seq.*	1
28 U.S.C. § 1603	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-459

NATIONAL IRANIAN OIL COMPANY,

Petitioner,

v.

ASHLAND OIL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

PETITIONER'S REPLY BRIEF

---

1. The decision of the court of appeals is neither good for a day only nor limited to its "Iranian" facts and thus, as Ashland asserts, of no broad significance. The opinion below plainly permits any United States company to avoid its contract to arbitrate so long as the arbitration clause sites the arbitration in one of the ninety-one countries which has not signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. §§201 *et seq.*) ("Convention"). Nothing further is required, according to the court of appeals, except a refusal by the United States company for any reason whatever to

arbitrate anywhere. Ordinarily such a refusal to arbitrate in the place agreed to would be considered a waiver by the defaulting party of the right to enforce the forum selection clause and would not affect the more basic promise to arbitrate. Not so here, held the court below, because it was the National Iranian Oil Company's ("NIOC") fault that Ashland would not come to Iran to arbitrate: "[a]s part of the revolutionary Government, NIOC certainly bears responsibility for creating the chain of events making it impossible for an American entity" to arbitrate in Iran (App. 17a).[1]

At the same time the court also found that NIOC could not waive its right to a Tehran arbitration by seeking to compel arbitration in Mississippi: NIOC had "no right to an order compelling arbitration in Tehran" because Iran is not a signatory to the Convention and thus had nothing to "waive" (App. 13a).[2] The result of this approach is to encourage court litigation of claims arising under contracts calling for arbitration in a non-Convention country. Under the decision below, when the American company simply refuses to arbitrate and the foreign company cannot

---

[1] It has never been NIOC's position that arbitral proceedings could not fairly be conducted in Iran. NIOC's point is that even accepting Ashland's stated concerns at face value—namely Ashland's assertion that it was impossible for it to engage in an arbitration in Iran—this still did not relieve Ashland of the obligation to arbitrate somewhere.

[2] Ashland's Opposition concedes, however, that an arbitral award rendered and confirmed in Tehran might be enforced against it in the United States. Opp. at 15. Accordingly, NIOC did have rights which it would relinquish if arbitration were ordered in Mississippi.

compel arbitration abroad, the otherwise arbitrable dispute must be litigated.

This analysis applies not just to Iran but to the other 91 nations which have not signed the Convention and with whom United States trade in 1986 exceeded $90 billion.

2. In its Counterstatement of the Case, Ashland details various legal steps that NIOC has been forced to take in order to protect and preserve its claim for $282,881,712.40 for oil sold and delivered to Ashland. These steps include attempts to secure arbitration and filing suit to prevent the running of the statute of limitations in potentially available fora while Ashland refused to arbitrate. Ashland's Counterstatement thus illustrates the very pattern of "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages" in the "dicey atmosphere of a legal no-man's land" of transnational litigation. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1976). This Court found avoidance of such difficulty to be a major reason international business transactions so frequently are governed by arbitration clauses.

The Counterstatement confirms that Ashland's stonewalling arbitration is succeeding in forcing litigation in a national court system of a dispute Ashland agreed to arbitrate.[3] Other companies similarly situ-

---

[3] NIOC has made clear that if arbitration is ordered it will promptly so advise the Bermuda court which then can be expected to continue the stay which it has ordered of the action pending there against Ashland's Bermuda subsidiary. Consequently, Ashland's suggestion that NIOC prefers litigation to arbitration is erroneous. As the Bermuda court found "NIOC

ated will be likewise encouraged by the decision below to litigate claims in the national court system "hostile to the interests of one of the parties or unfamiliar with the problem." *Id.* at 516. Potentially this strategy affects a significant volume of trade and is not limited to Iran. Ashland's strategy is bound to spawn many imitators.

3. Ashland complains that it is unfair to arbitrate its claim in Mississippi because of some alleged lack of reciprocity. Ashland, however, does not object to litigating in Mississippi and at present can only be found there. By insisting on litigating, but not arbitrating, in Mississippi, Ashland confirms its desire to avoid the neutral, expert decision-makers to whom it agreed to submit its dispute. It further confirms that its opposition to arbitration is not based on any notion of convenience or fairness but rather stems from a desire to do battle on its own turf before an American jury.

In one important respect, however, Ashland will be better off if arbitration is ordered in Mississippi than if its claims are litigated there. Ashland suggests unfairness in that NIOC has no assets in the United States and Ashland will thus be unable to collect an award should it prevail on its counterclaims. This concern applies equally to an arbitral award and a court judgment. An arbitral award in Mississippi will be one rendered in the territory of a signatory to the Convention, and thus enforceable in any Convention country according to the Convention's streamlined procedures. A judgment in favor of Ashland will not enjoy the same ease of enforcement abroad.

---

has consistently throughout sought to obtain a private arbitration of its claims in whatever situs might be available ...." App. 54a.

This alone refutes any suggestion of unfairness in NIOC's having sought to compel arbitration in Mississippi where it found Ashland after diligently seeking to obtain arbitration outside Iran and being rebuffed by Ashland.

4. Ashland suggests that the court of appeals' disregard of NIOC's separate legal status was not important to its refusal to apply the Arbitration Act to the dispute below.[4] The contrary is true. Only because the court regarded NIOC as "part of the revolutionary government" (App. 16a-17a) was it therefore chargeable, in the court of appeals' view, with creating the conditions which prompted Ashland's refusal to arbitrate in Iran. Having found NIOC responsible for the conditions of unrest in Iran, the court of appeals then refused to enforce the arbitration promise either positively by compelling arbitration under Section 4 of the Arbitration Act or negatively by staying Ashland's counterclaim under Section 3 of the Act.[5]

---

[4] The fact that NIOC is defined as a foreign sovereign by the Foreign Sovereign Immunities Act (28 U.S.C §1603(a),(b)(2)) does not validate the court of appeals' blunderbuss disregard of its separate juridicial status. The same could have been said in *Bancec* where this Court enunciated the presumption of a state instrumentality's separateness. Nor do the definitions of the Algerian Declarations, which identify the types of claims which can be brought at the Iran-United States Claims Tribunal, have any remote bearing on this issue.

[5] Ashland erroneously states that the court of appeals' refusal to stay its counterclaim is not here at issue. Section II of NIOC's Reply Brief in the court of appeals was titled "The Arbitration Agreement May be Enforced under 9 U.S.C. §§3 and 4." Likewise, NIOC's Petition for Rehearing again pressed this point. App. 1a-2a. Finally, the court of appeals devoted several pages of its opinion to the stay issue. App. 7a-10a.

The failure to recognize NIOC's independent juridical status, therefore, was pivotal to the error below. As the United States noted *amicus curiae* in *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* ("Bancec"), 462 U.S. 611 (1983) the status of governmental trading companies as separate juridical entities is a sensitive matter in our foreign relations. Brief for the United States as Amicus Curiae, Oct. Term 1982, No. 81-984, p. 12 (Pet. 16).

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted. In addition, it may be appropriate for the Court to invite the United States to express its views in this case.

Respectfully submitted,

STEPHEN M. TRUITT
Counsel of Record
MARK SCHATTNER
SUSAN L. LAUNER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006-5203
(202) 842-8100

ALEX A. ALSTON, JR.
CHARLES R. DAVIS
THOMAS, PRICE, ALSTON,
JONES & DAVIS
121 North State Street
Jackson, Mississippi 39215-1532
(601) 948-6882

Counsel for Petitioner

Dated: October 30, 1987